No. 15652

In the

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY, a corporation
Appellant,

vs.

BRADLEY MINING COMPANY, a corporation
Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Southern Division

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SUBJECT INDEX

TABLE OF AUTHORITIES

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Summary Statement of the Case

NATURE OF APPEAL

This case involves the interpretation of a written agreement entered into by appellant (United herein) and appellee (Bradley herein) on December 31, 1941 (R. 12 ff). The agreement covers certain mining claims in the State of Idaho. The dispute concerns the manner of computing royalties on minerals and ores extracted from the mining claims.[1]

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(1) Time to file this reply brief was extended to December 20, 1957 by order of this Court.

All emphasis in quotations has been added unless otherwise indicated.

A summary judgment in favor of Bradley was reversed by this Court and the case was remanded to the District Court for further hearing on the merits.[2] The pre-trial conference and trial were held before District Judge William C. Mathes at Boise, Idaho.

The District Court determined that the December 31, 1941 contract was unclear (R. 98, 99, 242).[3] Testimony was received, *all of which was uncontradicted,* as to extrinsic evidence bearing upon the meaning of the contract—the surrounding facts and circumstances, mining industry custom and usage, and conduct of the parties. United rested its case after the introduction of certain documents (R. 91), and produced no witness or testimony in support of its interpretation of the agreement or in rebuttal of Bradley's evidence. Judgment was rendered for Bradley. We respectfully submit that the judgment below is fully supported by the record and should be affirmed.

THE ISSUE OF CONTRACT CONSTRUCTION

Bradley had been mining United's claims since 1927 under a succession of royalty agreements. A May 16, 1939 agreement was changed to a conveyance on December 31, 1941 of the claims to Bradley.

As consideration, Bradley promised to pay five per cent (5%)—a lower royalty than the 1939 contract—for 999 years

> "on all *net smelter returns, net revenue,* and *net mint returns,* as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the above

(2) United Mercury Mines Company v. Bradley Mining Company, 233 F.2d 205.

(3) Judge Mathes' comments after trial and argument of counsel (R. 242-253) are set forth in the Appendix to this brief.

described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims * * *" (R. 15)

The 1941 agreement royalty provisions are referred to as "net smelter returns", "net revenue" (or market) and "net mint returns"—also as "smelter, *market,* and mint" (R. 15-18). The provisions *at issue* are "net smelter returns" and "net revenue"—*not* the "net mint returns" clause.

Without some background of the mining and smelting industries, these terms may have little reality. These observations are based on the uncontradicted record.

Mining Process—Smelting Process:

One basic (and stipulated) fact is that "mining" is recognized to be different from "smelting" or the smelting process. A mine operator extracts ores from the ground and customarily crushes and treats them at the mine in a mill (concentrator). This "ordinary mining process" results often in a form of "concentrate" that may be *un*marketable in such state—being a mixture of things such as sulfides and impurities of arsenic, sulphur and the like. The marketable metal, after the "mining process", is often "captive" in the concentrate. However, there may be a market for a particular concentrate in such form, i.e., a purchaser who can use the concentrate in its business, "as is".

But the *smelter process* is different from the *mining process.* A smelter obtains or "releases" the captive or "contained" metal in a concentrate by "electrolytic depositions, roasting, thermal or electric smelting, or refining" (using the language of the 1939 Internal Revenue Code, which the parties discussed in 1941, dealing with depletion.)

The smelter treatment process makes an *un*marketable product (a concentrate) into a *marketable metal.* Thus, an *additional value* results through the smelting process at the cost—among other things—of labor, power, supplies and reagents, and a substantial investment of capital.

A market—the source of income on which a percentage royalty is to be based—depends on whether a purchaser will buy the concentrate "as is", for use in his business, *or* whether the "contained" or captive metal must be recovered in a marketable state *through an additional treatment process,* i.e., by treatment at a smelter.

Bradley Smelter:

There was no smelter at or near the mining property in 1941. Bradley erected its own smelter ("Yellow Pine smelter") on the property in 1949.

Before *the Bradley smelter was erected,* Bradley sent concentrates to "outside" or "third party" smelters and accounted to United on the basis of a percentage of the "net smelter returns" from such smelters. There is *no* accounting question about such royalties.

After *the Bradley smelter was in operation—*

(a) Bradley sent ½ of the *gold* concentrates to outside smelters, and again paid United royalties its percentage of such smelters' net smelter returns. These payments are *not* questioned.

(b) *Bradley's smelter treated the remaining one-half of the gold concentrates* and paid royalties to the United on the same basis as if the concentrates had been treated in outside smelters, i.e., *Bradley deducted similar smelter treatment charges*—on the *net smelter returns* basis. United benefited on this computation because of no deduction for

transportation to outside smelters. These smelter payments are disputed by United.

(c) *Bradley's smelter treated substantially all of the antimony concentrates* and computed royalties to United "on the basis of past practices of antimony shipments to outside smelters" with a deduction of similar smelter treatment charges, i.e., *"net smelter returns"*. Again there was a benefit to United because of no deductions of transportation to outside smelters. These royalty payments are disputed by United.

United's Position:

United does not question the fairness of any of the Bradley smelter deductions for products of the mine treated in its smelter. *United admits that* if *Bradley may deduct its smelter charges*—as in the case of outside smelters—*then judgment should be for Bradley.*

But *United contends* that on the mine products which were processed at the Bradley smelter, *Bradley should not be permitted to deduct* any *treatment charges whatsoever,* i. e., that Bradley may not compute royalties to United under the "net smelter returns" clause.

Therefore United contends that after the Bradley smelter has reduced *un*marketable mine concentrates to *marketable* products—Bradley should have *no* deduction for its smelting treatment charges, but should account to United by paying the percentage royalty of the price the ultimate purchaser or customer in the market pays for the finished product of the smelter i.e., under the "net revenue" provision.

United in its behalf cites no evidence whatsoever in favor of its position; relies on the face of the "plain, clear, and unambiguous contract;" and appears to be content in claim-

ing that the issue of construction was not before the trial court—a claim which will be seen to be clearly erroneous in light of this Court's opinion. (*United Mercury Mines Company v. Bradley Mining Company*, 233 F.2d 205).

Bradley's Position:

1. If given the interpretation United contends for, the "net revenue" clause makes both the "net smelter returns" and "net mint returns" clauses superfluous, *as both smelters and the mint are "purchasers".*

2. *United's contention also completely ignores one of the "net smelter returns" provisions.* United has not even quoted this second provision. Yet the uncontradicted evidence is that at the time of the 1941 agreement *a Bradley smelter erection was contemplated by the parties.* Therefore, Bradley submits that this particular clause (R. 18) would (by the testimony) read:

> "Should a [Bradley] smelter or other reduction works be erected * * * then there shall be deducted from the *net smelter* or reduction returns a fair charge for trucking * * *"

3. United has ignored uncontradicted testimony as to custom,—that the mining process is distinct from the smelting process; that the parties were searching for a market provision not involving either the smelter process or the mint; and *that the "net revenue" clause was specifically inserted as a "catch-all" to provide for a royalty from a market which was neither a smelter nor a mint*—and more specifically to cover purchases in the open market of *tungsten* and *mercury.*

4. United has ignored the uncontradicted testimony that the main purposes of the change from the 1939 agreement to the 1941 agreement was to reduce Bradley's royalties

(from a graduated 7½, 10 and 12½ per cent scale *to* a flat 5% scale), and to make it economically feasible to mine low grade ore.

5. United has also ignored testimony as to the *conduct* of the parties, and particularly the recognition by United for 2 years (1943-1945) of "net smelter returns" royalty computation by Bradley to United on concentrates treated at Bradley's own purification plant at Boise (*Bradley having deducted its treatment charges and depreciation, without any objection by United*).

Finally, it is agreed, that under Bradley's interpretation United has received as much *and more* in royalties than it would have received if Bradley had sent all production to an outside smelter.

Bradley, therefore, contends that—as an afterthought—United is seeking to reap windfall profits and to penalize Bradley for construction of its own smelter, by claiming that the 5% royalty should apply to the ultimate market purchase price *"of the smelter product"* i.e. 5% on the additional values added by the smelter metallurgical process—without allowance for the usual treatment charge deductions of an "outside" smelter.

The question then is, shall United get the same royalty when the concentrates go through a smelter owned by Bradley on the premises—as if they went through an independently owned smelter,—**or** *is United to get a greater royalty merely because the smelter is owned by Bradley.* The record shows a greater return to United because of the Bradley smelter operation (over that of an "outside" smelter). Rephrased, the question is whether, *in addition,* the share of the smelting costs—*which would otherwise be borne by United*—are to be saddled upon Bradley.

PRIOR PROCEEDINGS

This action was commenced by United against Bradley in the United States District Court in Boise, Idaho, on July 12, 1951.

(a) First District Court Proceeding.

Judge Healy sat as District Judge in the first District Court proceedings. After various proceedings the case came on for a pretrial conference. The District Court announced its construction that the "net smelter clause" was controlling. United took the position that it would only offer evidence in its case on the "net revenue" theory. On the Court's construction United conceded that it had no money claim, and consequently the complaint was dismissed. This was a summary judgment for Bradley.

(b) First Opinion on Appeal.

This Court, in its opinion of February 8, 1956, reached a different construction of the contract than did the District Court and remanded the case to the District Court for an accounting under the "net revenue" provision.

(c) Petition for Rehearing and Modification.

Thereafter on March 19, 1956, Bradley filed its "Petition of Appellee for Rehearing and Motion for Modification Under Fountain v. Filson, 336 U.S. 681". This Petition for Rehearing and Modification to which we respectfully direct this Court's attention, submitted that this Court's action in going beyond a mere reversal and remand was erroneous, in that it reversed a summary judgment for Bradley and directed a summary judgment for United. Bradley urged that it had been denied the right to a trial on the major

issue of the case—namely the construction of the 1941 contract.[4]

Bradley made an offer of proof as to questions raised by the text of the contract and to *available extrinsic evidence* pertinent to their solution (Pet. for Rehearing and Modification pp. 26-45).

(d) Order of May 15, 1956:

This Court on May 15, 1956, ordered a withdrawal of the opinion of February 8, 1956 and filed a substituted opinion.

(e) Opinion of May 15, 1956:

The substituted opinion was rendered by this Court on May 15, 1956. *United Mercury Mines Company v. Bradley*

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(4) A summary of the reasons submitted for the grounds that the action of this Court in going beyond a mere reversal and remand was erroneous was given at page 3 of the petition on rehearing and modification:

(a) If the contract does not on its face clearly bear the construction given it by the District Court, then under the applicable State law (controlling under *Erie R. Co. v. Tompkins*, 304 U.S. 64), it is sufficiently ambiguous so as to permit the introduction of extrinsic evidence as an instrument of construction;

(b) Under the law of California and Idaho, upon the slightest ambiguity in a contract, extrinsic evidence is admissible in aid of its construction;

(c) When extrinsic evidence is admissible, the construction is a question of fact, the case must be tried, a summary judgment construing the document is not permissible, and the fact that one party moved for a summary judgment does not justify entry of a summary judgment against it;

(d) Particularly, in such a case, an appellate court may not construe the contract. In going beyond a mere reversal and remand for an unfettered trial, and in similarly construing the contract, the Court's decision conflicts with *Fountain v. Filson*, 336 U.S. 681.

(e) Consequently, if the judgment of the District Court is to be reversed, the case should be remanded for a trial to determine the actual intent of the parties in making the contract and to this end to receive evidence of the customs, usages and practices of the mining and metallurgical industries, the background and circumstances in which the contract was made, the contemporaneous conduct of the parties under it, and other extrinsic circumstances, some of which we shall describe.

Mining Company, 233 F.2d 205. The opinion refers to the petition for rehearing and to Bradley's contention that "there remains untried an issue of fact in that there are relevant extrinsic circumstances of which it [Bradley] is prepared to offer evidence, as bearing on the meaning of the contract." The case was remanded to the district court for a trial of the issues of fact raised by the petition for rehearing.

(f) Pre-Trial 1957:

District Judge William C. Mathes held a pre-trial conference at Boise, Idaho on February 19, 1957. As a result a pre-trial order, approved as to form and content by the parties, was issued by Judge Mathes on March 11, 1957. The pre-trial order—with certain reservations as to materiality —contains numerous admitted facts and various stipulations as to accounting, and as to common knowledge, practices and customs on the mining and smelting industries (R. 419-435). These matters will be treated later in the statement of facts and argument.

(g) Trial 1957:

On March 19, 1957, the trial commenced before Judge Mathes at Boise, Idaho (R. 75-241). After offering certain exhibits, United rested its case without presenting testimony (R. 81-91). Bradley presented testimony from an admittedly qualified expert on the facts of the case, including the circumstances surrounding the negotiation and execution of the contract, customs and practices of the mining industry, and the practical construction of the contract by the parties (R. 92-238).

United offered no rebuttal (R. 239). After oral argument, Judge Mathes commented on the evidence (R. 242-253) and held in favor of Bradley—

"The judgment will be, declaring and decreeing that the proper legal method for determining the amount of royalty due United from Bradley under the terms of the 1941 contract for the minerals, ores, metals and values extracted or produced from the mining claims described in the agreement and conveyed to Bradley and smelted at the Yellow Pine smelter, owned by Bradley, is by the use of the net smelter return provision as defined in the agreement. I am referring now to the interpretation of the prayer of the Complaint as set forth at the bottom of Page 1 and the top of Page 2 of the Pretrial Conference Order."

(h) Findings—Conclusion—Judgment.

The written Findings of Fact, Conclusions of Law and Judgment were signed by Judge Mathes and filed April 24, 1957 (R. 36-66).

STATEMENT OF FACTS

A. History—1927 to 1951.

Prior to December 31, 1941—the date of the agreement under consideration here (R. 12ff)—United owned certain mining claims in Idaho. Since 1927, Bradley and its predecessors in interest, had conducted mining operations on these claims under a succession of royalty agreements.

(1) 1939 AGREEMENT AND OPTION.

The agreement just preceding that of 1941 was entered into on May 16, 1939 (R. 339ff). It provided for a graduated royalty of 7½, 10, and 12½ per cent (10% to commence August 1, 1944, and 12½% to commence August 1, 1949, until exercise of purchase option).

Three methods were specified for computation of royalties based on "net smelter returns", "net revenue" and "net mint returns".

(2) 1941 AGREEMENT.

It is uncontradicted that the *purpose of the change from the 1939 contract to the December 31, 1941 agreement* and conveyance *was to reduce Bradley's royalty rate,* i.e., to a flat 5%, *and to make it economically feasible for Bradley to mine low grade ore* (R. 132, 133; Finding XXVI, R. 51, 52).

The 1941 agreement also contains three royalty provisions—but in more detail than the 1939 agreement—as to "net smelter returns", "net revenue" and "net mint returns"; and also referred to as "smelter, *market,* and mint." (R. 15-18).

For the first time, in the trial—at which uncontradicted evidence was adduced—the background was given for a proper and complete interpretation of these royalty provisions. One answer is to be found in the extrinsic evidence of the usages, customs and terminology of the mining industry at the time the 1941 contract was entered into (in addition to the later construction by conduct of the parties). This involves primarily an understanding, as known to the mining industry, of terms such as "mining," "milling", "concentrating", "smelting" and other treatment processes as to materials extracted from the ground.

As the records shows, after what is known as the ordinary treatment or milling process at a mine of ores extracted therefrom, the products of such process have certain sources or *markets* resulting in "returns" on which a royalty is computed.

In the case of gold bullion, after the usual mining and treatment process, the market would be the U. S. Mint. The return from the mint is known as *"net mint returns".*

Other products of the mining and milling process—such as antimony—*would necessarily have to go to a smelter in the form of concentrates for additional treatment and refin-*

ing before a marketable end product is obtained. The return to the mine operator from the smelter, reflecting the smelter's treatment charges, is known as "*net smelter returns*".

However, certain minerals after being mined and concentrated are then in a product form for use by certain industries. *These concentrates, the end product of the mill or concentrator, are marketable without the added treatment of the smelting process.* Such a type of concentrate coming from the mill or concentrator is then ready for "*market*". The record, we submit, supports our contention that the "*net revenue*" provision was designed solely for the purpose of providing a royalty upon such a directly marketable product.

The three royalty provisions in the 1941 agreement reflected the different *markets or sources of income* from the past operational experience as to the mine's output. They also reflected well known customs and practices of the mining and smelting industries at the time (Finding XXXIV, R. 55).

In this latter connection, it was *stipulated* (R. 427)—

> "That it is a matter of common knowledge and historically recognized in the mining industry that *the milling of ores to reduce such ores to a concentrate form is a part of the mining process and that the* **smelting** *of ores* **is not a part of the mining process.**"

It is historically recognized in the mining industry that *the smelting process adds value to the products of a mine* (R. 191).

Before the execution of the 1941 agreement the parties knew that the mining property contained ores and values such as *gold, silver, antimony, tungsten* and *mercury* (i.e., quicksilver and sometimes described as cinnabar).

"Net Smelter Returns"

Prior to the 1941 agreement, concentrates from *antimony-gold* ores mined and milled (or concentrated) on the property were shipped to "outside" or "third party smelters" (not owned by Bradley). The smelters' settlements or "net smelter returns" reflected, among other things, the customary deduction for the smelter's treatment charges. Bradley's royalty payments to United were based on a percentage of these "net smelter returns".

Accordingly, the 1941 agreement contained the provision —(R. 17),

> "By *net smelter returns,* as used herein, is meant the amount received from the smelter * * * *it being understood that the smelter will deduct its normal smelting charges* * * *"

Here it should be noted that *the 1941 agreement also provides* (R. 18):

> *"Should a smelter or other reduction works be erected* between the mining property herein conveyed and Cascade, Idaho, *then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works."*

What smelter erection was in the contemplation of the parties in 1941? The uncontradicted testimony in this record is that the parties had discussed the possibility of a smelter being erected at or near the mining property. *The parties contemplated that such a smelter would be erected by Bradley* (R. 131, 134; 160-164; Finding XXVIII R. 52, 53).

See also the earlier provision of 1939 agreement (R. 352) "* * * *Should local reduction* of the concentrates become practicable *as determined by the Optionee* * * *" The Optionee, of course, was *Bradley.*

The foregoing will be considered in detail in a later discussion of United's sole contention in this case—that the *Bradley* smelter, later erected in 1949, should *not* be permitted "to deduct its normal smelting charges."

"Net Mint Returns".

Referring now to the remaining two sources of royalty income (other than a smelter)—in the early 1930's *gold* bullion had been produced at the mine and shipped to the U. S. Mint (R. 108, 109). Hence reference in the agreement to *"net mint returns"*. This clause is not involved in this action.

"Net Revenue".

The parties in December 1941 knew that there was *another source of income for royalty computations that was neither a smelter nor a mint. In the middle of 1941 tungsten was discovered at the property.* (R. 134, 135):

> "Q. After the 1939 contract was signed, and before the 1941 contract was signed, *was there any discovery on this property* covered by this litigation, *of any product* which could be mined and which could be mined and *which would not or could not be sold to a smelter?*
> A. Yes, sir.
> Q. What product was discovered on the property?
> A. *Tungsten.*"

Commencing in August or September of 1941, tungsten concentrates had been shipped *directly to a market*—i.e., *purchasers* or customers—who used the concentrate product *without involving the smelting process.*

Royalty was applied and *paid* by Bradley to United *in the Fall of 1941 on the "net revenue"* from such purchasers (R. 136-143).

At the time the 1941 agreement was executed there was no custom in the history of tungsten mining to send tungsten ore to a smelter (R. 143).

In addition to tungsten, the parties were aware of *mercury* on the property—a potential mine product that needed no treatment by a smelter and could be sold directly to purchasers (R. 109, 135, 136).

For the first time in this case there is specific testimony—which is *uncontradicted—as to the reason for the inclusion of the "net revenue" clause,* i.e., *"the discovery of tungsten and the knowledge of mercury in the district,"* (R. 134, 135, 194); and **"the reason being that we had other mineral products that were not covered by the net mint and net smelter clauses"** (R. 230).

The "net revenue" clause is aptly described by Judge Mathes as a *"catch-all"* provision to cover a recognized market which was neither smelter nor mint (R. 249).

And see the testimony at R. 186:

> "We were hunting for a clause that would cover products that would not go to a mint, such as gold bullion, or sulfide concentrates that would go to a smelter."

(3) OPERATIONS AFTER DECEMBER 31, 1941.

During this period to 1949, Bradley continued to ship antimony-gold concentrates to smelters and accounted to United on the "net smelter returns" basis.

But the most important part of the mining operation in the history of the mine from beginning to end, dollar-wise and tonnage-wise, was the continued production of tungsten —after the discovery and substantial shipments prior to December 31, 1941 (R. 183, 184). From 1941 into the year 1945 *Bradley shipped tungsten concentrates from the mine direct to purchasers, other than smelters,* and paid royalties to United based on the *"net revenue"* provision (R. 142; Findings XXIX, XXX, R. 53, 54).

(4) BRADLEY'S BOISE PURIFICATION PLANT OPERATION FROM 1943 INTO 1945—CONSTRUCTION OF CONTRACT BY CONDUCT OF PARTIES.

In *1943 Bradley constructed its own plant* at Boise, Idaho —known as the Boise Purification Plant. The purpose of the plant was to treat and further purify some of the tungsten concentrates extracted from the property—by removal of phosphorous, antimony, sulphur, arsenic and other impurities—before shipment to the market.

Bradley operated its Boise Purification Plant for approximately two and one-half years.

The Boise Plant treatment process was according to mining industry practices and custom "outside the realm of mining" (R. 142, 145).

During all of that period—1943 into 1945—*Bradley computed and paid royalties to United on the proceeds of all sales of tungsten concentrates* processed and treated at its Boise Plant, *after deducting—from the proceeds of such sales—the operating costs and depreciation of the Boise Plant.*

Monthly settlement sheets were submitted by Bradley to United with complete information as to all sales and deductions made by Bradley for operating costs and depreciation (R. 146-150).

The *method of settlement by Bradley with United,* as to computation and payment of royalties, *was under the "net smelter returns" provisions of the 1941 agreement* (R. 148; Findings XXXVII and XXXVIII, R. 57, 58).

All payments were accepted by United without any protest or objection (R. 149):

> "Q. Now did anyone representing the Plaintiff, United Mercury, ever complain or object to the method of settlement?
>
> A. No."

It should be mentioned that *this testimony as to the conduct and construction of the contract by the parties commencing two years after the execution of the 1941 agreement* —and extending for two and one-half years into 1945—*was uncontradicted* and was introduced without objection as to admissibility.

(5) BRADLEY SMELTER—1949.

After the cessation of tungsten production, Bradley decided in 1948 to erect a smelter at or near the property. It was principally designed for the production of antimony.

In 1949, Bradley's smelter, known as the Yellow Pine Smelter, was erected at the property at a cost of approximately $2,000,000.00. The cost of maintaining the operation was borne exclusively by Bradley (R. 167, 168, 182, 183; Finding VII, R. 42). *As has been mentioned, the contracting parties in 1941 foresaw this eventuality by including a specific provision in the 1941 agreement contemplating a local smelter construction* (R. 18),—*a Bradley smelter* (R. 131, 134; 160-164).

Thereafter substantially all of the antimony concentrates went into the Yellow Pine smelter. However, one-half of the gold concentrates went to "outside" or independent smelters. It was impossible to ship all of the gold concentrates to outside smelters owing to high arsenic and antimony content—and certain smelters refused to accept such a heavy tonnage of gold concentrates (R. 169, 170).

The *royalties* paid by Bradley to United *on account of gold concentrates* treated *in the Yellow Pine smelter* were *computed on exactly the same basis as the net smelter returns from outside smelters, except that United benefited substantially because of non-deduction of freight* (R. 171). Thus, United received more in royalties than if Bradley had sent all of the mine production to an outside smelter.

The uncontradicted testimony is that the *royalty computed on the antimony concentrates treated and processed at the Yellow Pine smelter was "on the basis of past practices of antimony shipments to outside smelters"* (R. 171):

"Q. How did you compute the royalties paid on account of the gold concentrates treated in the Yellow Pine smelter?

A. On exactly the same basis as the net receipts from the American Smelting and Refining Company, except in the beginning we did not deduct any freight so that the United Mercury Mines benefited substantially.

Q. How did you compute the royalties on the antimony concentrates treated in the Yellow Pine smelter?

A. On the basis of past practices of antimony shipments.

Q. To outside smelters?

A. To outside smelters."

And see R. 173:

"Q. Did you report to the Plaintiff your computation on account of antimony concentrates that were treated in your own smelter?

A. Yes, we reported to the Plaintiff.

Q. That was beginning then in August of 1949, and continuing until 1952?

A. Yes.

Q. Did the defendant compute and pay royalties in accordance with that method on all the concentrates, the antimony concentrates that were ever treated by the Yellow Pine Smelter?

A. Yes."

(6) 1950 SUPPLEMENTAL AGREEMENT.

There was a supplemental agreement negotiated between the parties on July 20, 1950 (R. 377-381). That contract is referred to in the testimony (R. 173-177).

It is to be noted that (R. 175, 378) one of the "whereas" clauses recites in part:

> "The said *Bradley* Mining Co. *did,* on the 20th day of June, 1950, *pay* to the United Mercury Mines Company *the royalties due for the month of May, 1950.*"

In the agreement itself there is the following provision (R. 175, 380):

> "*It is* further *agreed* that said *Bradley* Mining Co. *shall make the usual monthly reports* as to moneys received by it during the preceding month upon which royalties would be payable, stating the amounts of royalties that had accrued, but, instead of sending the check as has been the practice during the past ten years, shall make a notation thereon to the effect that the above accrued royalty has been postponed * * *"

The evidence is uncontradicted that royalties paid to United upon the products of the mine treated by Bradley at the Yellow Pine smelter before, in and after the month of May, 1950 were computed and paid according to the "net smelter returns" method provided for in the contract of December 31, 1941.

(7) PAYMENT OF ROYALTIES ON NET SMELTER RETURNS METHOD MADE FOR APPROXIMATELY TWO YEARS WITHOUT OBJECTION.

The uncontradicted evidence is that no one representing United objected to the method in which Bradley had been computing royalties on materials that went through the Yellow Pine smelter, i.e., on the *net smelter returns* basis—for approximately two years after the Yellow Pine smelter was placed in operation. The first objection was made in about mid-1951 (R. 178, 179).

And see Finding XLI (R. 61):

> "That the defendant has computed and paid royalties to the plaintiff upon products of the mine treated and

processed by the defendant at the Yellow Pine Smelter on the same basis and utilizing the same treatment schedule, but without deducting freight charges, as in the case of identical concentrates shipped to outside smelters; the net effect being that plaintiff benefited in royalty payments when identical concentrates were smelted by the defendant at the Yellow Pine Smelter as compared with the best arrangement that could be made with an independently owned smelter; and the plaintiff did not object to the payment of such royalties by the defendant upon the basis of 'net smelter returns' until 1951."

(8) UNITED FILES ACTION AGAINST BRADLEY—JULY 1951.

This is the end of what we have called the "history" of the operation at the mining property.

United's contention is that—although third party smelters' deductions for treatment charges are proper—Bradley cannot deduct its "normal smelting charges". No other question is raised. United concedes that if Bradley is allowed to account to it under the "net smelter returns" clause on mine products processed in the Bradley smelter, then the judgment shall be affirmed. In short, **it was admitted at the trial that if Bradley is permitted to deduct its smelter charges—as in the case of other smelters, "judgment is for the defendant" (Bradley)** (R. 239, 240, 241).

In the long history of operations from 1927 to 1951 there is no other accounting contention—*the issue is only as to concentrates processed by Bradley in its own smelter from 1949. United does not claim the Bradley smelter treatment charges are unfair or excessive.* Its sole contention since the action commenced is that the *"net revenue"* clause governs; that United's royalty percentage should apply on a purchaser's or customer's payments for the *product of the smelter*—i.e., *on the value added by the smelter process,* with no al-

lowance whatever for the historically recognized deduction by a smelter for its treatment charges.

From the commencement of the action, United has refused to come to grips with the facts, circumstances, customs of the industry, or practical construction of the contract by the parties. United's Opening Brief is typical. The District Court's Findings, according to United, are "immaterial". (App. Op. Br. p. 10). Apparently, to United, the pre-trial and trial before Judge Mathes at Boise were a waste of time because, as United contends, the disputed portions of the 1941 agreement are "clear, plain and unambiguous" in United's favor (App. Op. Br. p. 11).

Both sides initially took the position that the contract was unambiguous and clear on its face. But, although United is still unwilling to accept the situation in its Opening Brief, it is now apparent that language in the contract of December 31, 1941, is susceptible of more than one interpretation and is ambiguous. There is not only the dispute of the parties, but also the fact that Judge Healy, sitting as the District Judge, gave one construction, this Court gave a different construction, withdrew its opinion, rendered a substituted opinion, and remanded the case for a further hearing upon the merits in the District Court.

Judge Mathes makes the following comment (R. 242):

> "The Court: The contract is admitted and the salient features that we are involved with are, of course, as set forth on pages 15 to 18 of the record on appeal, which is excerpted from Exhibit Seven here.
>
> We bear in mind that the contract was made in 1941 and the smelter built in 1949. Our problem here is to ascertain the intention of the parties in the light of the facts and circumstances in evidence surrounding execution. The controversy arises, of course, because *the contract is unclear as applies to this subsequently constructed smelter operation on the property, although*

admittedly the contract contemplated the possibility. It did not literally in so many words cover the contingency of the smelter on the property owned and operated by one of the parties to the contract."

In the foregoing chronology, brief references have been made to some of the "facts and circumstances in evidence surrounding execution" of the 1941 agreement. To give a more complete presentation, we will set forth additional extrinsic evidence. We also feel it helpful to elaborate upon some of the points already touched upon.

B. Discussion of Extrinsic Evidence.

In the Petition for Rehearing and Modification (pp. 26-45) above referred to, an "offer of proof" was made, of available extrinsic evidence pertinent to the solution of the questions raised by the text of the 1941 agreement. We submit that the uncontradicted testimony, and the pre-trial stipulations fully support *and go beyond* the offer that was made.

(1) SMELTER AT PROPERTY CONTEMPLATED BY PARTIES IN 1941 WAS A BRADLEY OWNED SMELTER.

Referring to the above comment of Judge Mathes as to the "contingency of the smelter on the property owned and operated by one of the parties to the contract," the record is clear *and uncontradicted* that as early as 1939 *the parties discussed and contemplated a possible smelter erection by Bradley* **and only by Bradley** (R. 131-134; 160-165).

Research as to the best methods of local reduction (i.e. smelting) "starting in the early thirties" was made by Bradley and Bradley would report to United "periodically as to our progress." (R. 133, 134).

And see (R. 162, 163)

"Q. When did you talk to the people on the other side about the possibility of smelting or local reduction? * * *

A. At numerous times.

The Court: Commencing when?

A. Commencing in late '38 through '40, I will say late thirties and through the forties * * *

The Court: Did you ever talk with Mr. Oberbillig [President of United] about the possibility of a smelter being constructed at the mine?

A. Yes * * *

The Court: About when?

A. The late thirties * * *

The Court: At the time you were negotiating the contract, —in 1941 were there any negotiations about it.

A. Yes."

The record, as to *who* might build the smelter under discussion, definitely shows the contemplation of a Bradley smelter (R. 164):

"The Court: I asked was it discussed, about the possibility of one being built?

A. Yes.

The Court: The maybe's of the situation were discussed?

A. Yes.

The Court: *And that referred to the possibility that the defendant here might build?*

A. *Yes.*"

As the record shows, a smelter is also referred to as a refinery plant or reduction works.

It is to be noted here that in the *1939* agreement between the parties the possibility of an erection of a smelter by Bradley was *specifically* referred to. (See agreement of May 16, 1939, R. 339 at R. 352):

> "It is understood, however, that should local reduction of the concentrates become practicable *as determined by the Optionee,* that no concentrates will be shipped."

Bradley, as mentioned before, was the "Optionee".

And now let us refer to a similar or expanded paragraph in the December 31, 1941, contract (R. 12 at R. 18). The uncontradicted testimony refers to this paragraph, and is as follows (R. 164):

> "Q. Will you observe, Mr. Bradley, there in the first paragraph beginning on that page, *'Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.'* Now, was that provision discussed among you before this contract was signed?
>
> A. Was it discussed before the contract was signed?
>
> Q. Yes?
>
> A. Yes.
>
> Q. When I say discussed, I mean with the other side?
>
> A. Yes.
>
> Q. Was there any suggestion made that should reduction works be erected they would be erected by anyone except Bradley?
>
> A. No."

The emphasis in the above quoted paragraph with regard to trucking charges, in the light of the above testimony, points up the fact that should a *Bradley smelter* be erected, the Bradley smelter should be able to "deduct *from the net smelter or reduction returns*" a fair charge for trucking.

With this key word inserted the provision reads "should a **Bradley** smelter or other reduction works be erected * * *

then *there shall be deducted from the net smelter or reduction returns a fair charge for trucking.*"

There was no cross examination on the above quoted testimony—and no rebuttal.

A glance at United's opening brief will suffice to show that this testimony is not discussed. Nor is the above quoted smelter return provision even included in the royalty clauses that United has quoted as being applicable to this case.

Here also it must be pointed out that it has been stipulated by the parties in the pre-trial order that if Bradley is entitled to make any charge or deduction for smelting at its Yellow Pine smelter for all ores processed through it, then all royalties have been paid and there is nothing more due or owing to United. (See pre-trial order R. 425, 426).

> "That, if under the terms of the contract, defendant, Bradley Mining Company is entitled to make any charge or deduction for smelting ores in the Yellow Pine Smelter, the charges and deductions so made by Bradley Mining Company have been proper charges and deductions and all settlements made with the plaintiff have been correct.
>
> "If it is ultimately determined that the net smelter returns provisions of the agreement is applicable to the operations at the Yellow Pine Smelter for ores, concentrates, metals and values taken from the claims described in the agreement, then the settlements made by Bradley have been correct as to the minerals, ores, metals and values processed at the smelter."

And see the admissions of counsel for United (R. 240):

> "In other words if the net smelter returns provision applies the judgment is for the defendant * * *";

And at R. 241:

> "If the net smelter returns provision applies we are still not interested in an accounting, because it is

admitted that they have properly accounted for everything under their theory of the net smelter returns."

(2) CUSTOM—INTRA COMPANY ACCOUNTING—"NET SMELTER RETURNS RECEIVED."

There is another matter of custom which is stipulated to in the record. This bears upon the language "net smelter returns" and "amount received from the smelter." There has been some contention that this word "received" connotes payment by a third party or "outside smelter" and that therefore the "net smelter returns" clause may not be applicable to a smelter owned by Bradley.

Actually in the industry this term signifies net realization after smelting, whether by way of cash paid or credit given. This is caused by the fact that in many instances a mining company owning and operating a smelter will also own and operate mines, and settle on the same basis as such smelting or mining companies would settle with independent customers. This was the practice and custom of the trade where ores treated came from mines owned by the owners of smelters or came from mines leased and mined by the smelter owner, or came from independent custom shippers. The resultant accounting or settlement is a reflection of the smelter charge and cost of transportation if any. The net amount was commonly referred to in the mining and smelting industries as "net smelter returns".

Because of the importance of this stipulation which shows that this custom was in effect before the 1939 and 1941 agreements we are setting it out in full (R. 426, 427):

> S. That before 1939 and thereafter at all times material to this action it was the practice and custom in the smelting industry for companies who own and operate smelters to also own and operate mines; that it was likewise the practice and custom in the industry for companies owning mines and also owning smelters to

ship their mine products to their own smelters; that it was likewise the practice and custom with respect to owners of smelters and mines to also lease mining properties from other independent owners and send the products extracted therefrom to their own smelters and to settle for the products so shipped on the same basis as such smelting companies would settle with independent or custom shippers; **that it was a practice and custom of the trade that where ores treated came from the mines owned by the owners of smelters, or came from mines leased and mined by the smelter owner, or came from independent custom shippers, that the smelting charges and the cost of transportation of concentrates to the smelter were deducted to arrive at a net amount commonly referred to in the mining and smelting industries as "net smelter returns".** (Stipulation).

Similarly the uncontradicted testimony is to the effect that the foregoing custom was in effect in Idaho in 1939, and that it was the custom and practice "for separate records to be kept as to the production of the mine as distinguished from the production of the smelter" where a mining company smelted ores from properties 100% owned, 50% owned and on a lease and option basis" (R. 129, 130).

(3) PURPOSE OF CHANGE FROM 1939 TO 1941 CONTRACT.

It is uncontradicted that one of the purposes of the 1941 agreement was to reduce the amount of royalty required to be paid by the appellee. The 1939 contract provided for a graduated royalty: 7½% from 1939 to 1944; 10% from 1944 to 1949 and 12½% from 1949 and thereafter (R. 351, 352).

See the uncontradicted testimony at R. 132-133:

"Q. You stated that negotiations for the 1941 contract began sometime early in the year and that you

discussed the matter with the representatives of the plaintiff, and I asked you then if you stated the reasons why you wanted the contract changed, and you said 'Yes,' now, what were those reasons?

A. The reasons were that the '39 contract, in our minds, was going to become burdensome owing to the royalty, the graduated royalty schedule contained in it.

Q. The royalties were too high?

A. The royalties were higher than we thought we could economically bear. In other words, ore that would be ore under a certain royalty would not be at the higher rate of royalty.

Q. Would that then, in effect, place a limitation on the mine?

A. Yes, sir, oh yes.

Q. Now, coming to another subject, Mr. Bradley—

The Court:—Was this told to the Plaintiffs?

A. Yes, as the reason, our reason for wishing it.

The Court: I will reverse the ruling on that, I think that should stand,—that answer, as the reason why the contract, why the 1939 contract was terminated and the new contract was negotiated. It being a motive or purpose expressed to the other party, that, in my opinion, would be admissible."

The significance of the change from the 1939 contract to the 1941 contract is aptly commented upon by Judge Mathes (R. 251).

"One of the most compelling purposes or one of the most compelling considerations, as I find it in interpreting this contract, is the purpose the parties had in setting or putting aside this 1939 agreement, and creating the 1941 agreement. It is admitted that the purpose of the defendant, of course, was to get the lower royalties, but important here is the purpose of the plaintiff in granting the lower royalties, and that purpose was to induce and make it economically feasible and attractive for the defendant to mine ores of a lower quality.

It's admitted here that the construction of this contract, which would not permit the defendant to deduct the smelting charges, would result in substantial increase in the amount of the royalty over that that would be payable were the net smelter returns provision to apply whenever ore is smelted. That in itself as I view it and find, would be a construction contrary to the purpose of the contract and contrary to the plaintiff's own avowed purpose at the time the contract was executed."

(4) SMELTING IS NOT CONSIDERED PART OF A MINER'S ORDINARY TREATMENT PROCESSES.

Mining is—in part—the extraction of various minerals or ores from the ground. But mining, as known in the mining industry, is also the treatment or "dressing" of ores in a plant, mill or concentrator. Such treatment is part of a *mining process.* The *smelting* of ores *is not a part of the mining process.*

See again the pre-trial stipulation (R. 427):

"T. That it is a matter of common knowledge and historically recognized in the mining industry that the milling of ores to reduce such ores to a concentrate form is a part of the mining process and that the smelting of ores is not a part of the mining process. (Stipulation)."

And see the testimony at R. 204:

"The product from the mine stops when the production process is complete so far as mining concentration terminology is concerned. It does not involve steps such as smelting that completely change the character and reduce the mined product to a metal."

A mine of any consequence has a local treatment plant for its ores—usually a mill or concentrator—depending upon what is being mined. Although it is customary throughout the mining industry for mines to be equipped with some

sort of treatment or concentration facilities, the number of mines outnumber the number of smelters in the industry by a wide margin. It is not economical in the mining industry for the ordinary mine to be equipped with a smelter (R. 180).

The treatment in the mining process varies. For example, a **gold** mine may have—as this property did prior to the 1939 and 1941 agreements—a concentrator in the form of a cyanide plant. This treatment resulted in gold bullion. The market for this bullion—and the only market for years—has been the United States Mint. (R. 108, 109). The mint—or market—meant "net mint returns" to the mine operator. There is no dispute as to the meaning "net mint return" clause of the contract (Pre-Trial Order stipulation "R," R. 426).

As to **mercury,** (quicksilver or cinnabar) which the parties were aware existed on this mining property, the custom and the practice in the industry at the time the contract was formed for concentrating the product was a treatment process of roasting, condensing the fumes and recovering the marketable product at the mine. This is regarded as part of the mining process (R. 135, 136). The market for mercury as a *metal* and end product of the concentrating process was *not* a smelter—the finished product being sold directly on the market for use by consumers (R. 109-135, 136).

As to **tungsten,** the custom and practice of the mining industry, at the time of the contract, was to treat the ore in a concentrating plant at the mining property by a combination method of flotation and gravity—referred to as either milling or concentrating of ores, and resulting in an end product called tungsten concentrates. This concentrating method was recognized in the industry as a part of the mining process.

Bradley began making tungsten concentrates in 1941 and commenced shipment in either late August or late September, 1941 (R. 136-138). The tungsten concentrates were marketed for direct use in such form by consumers (R. 139-142). There was no custom in the history of tungsten mining at the time of sending tungsten ore or tungsten concentrates to a *smelter* (R. 143).

As to the production of tungsten concentrates— it should be stressed that these concentrates shipped by Bradley to customers and consumers direct on which the "net revenue" clause would apply because no smelter process was involved, became the most important part of the mining operation in the history of the mine from the beginning to the end, tonnage-wise as well as dollar-wise (R. 183, 184; Finding XXIX, R. 53).

As to **antimony**—prior to 1937 ores extracted at the property were processed into concentrates having a combination of antimony and gold. (R. 103). In accordance with the practice of the industry in the disposition of antimony and gold concentrates, and prior to the 1941 contract, these concentrates were sold to a smelter which was the *market* resulting in "net smelter returns," (R. 109) reflecting treatment and other charges.

Here the mining process involved extraction and treatment at the mining property to produce concentrates. In order to obtain a finished product it was necessary that additional treatment, i.e., *smelting*, be done which completely changes the character and reduces the mined product to a metal (R. 204). *In other words the end product or finished product was not obtained until it had gone through the smelter treatment process* (R. 214).

(5) THE SMELTING PROCESS—ADDED VALUE:

It has been admitted that the smelting of ores is not a part of the mining process. In the mining industry at the time of the 1941 contracts, the term "smelting" had and always has had a special signification (R. 144). The three essential steps of smelting are roasting, reduction and refining (R. 127, 144). Because of the capital outlay and economics involved, smelters are rare and the usual custom is for a mine not to have a smelter. (R. 212). In the history and practice of the trade it is well known that *smelting* adds value to the products of a mine. The uncontradicted testimony is as follows: (R. 191).

> "Q. Mr. Bradley, does the smelting process add value to the products of the mine?
>
> A. Yes.
>
> Q. Will you explain that briefly?
>
> A. You are taking, in effect, a crude material that is very close to its native state, still containing gang*ue* materials, impurities such as arsenic, sulphur and so forth. The product from the mine, being the product from the mine and the concentrator not having any use, whereas the end product after smelting and refining having a use, it being reduced down to its final state for manufacturing purposes. *An example in case of antimony is the history and practice of the trade has been that the ore or concentrates is approximately one-half of the value of the finished product.*"

(6) 1939 INTERNAL REVENUE CODE:

As one of the surrounding circumstances, the uncontradicted testimony shows that *at the time the 1941 agreement was being formed tax problems involving depletion were discussed by the parties* (R. 210). This Court may take judicial notice, as the District Court did, of the fact that Section 114(b) (4) (B) of the Internal Revenue Code

of 1939 defines "gross income from the property" as meaning the "gross income from mining".

The definition of the term "mining" as contained in that section of the U. S. Internal Revenue Code *includes the ordinary treatment processes* which, as we have shown, according to the universal usage and custom in the mining industry, are considered to be a part of *mining. But it excludes* from the definition of "mining" *the additional process* for purification and treatment of ores and minerals *such as* "roasting, thermal or electric *smelting,* or *refining"* (Finding XXIII, R. 47).

It is obvious from the uncontradicted testimony as to the practices, usage and custom in the mining industry at the time the 1939 and 1941 contracts were executed that there was a definite statutory recognition of the industry distinction between *mining,* and the *smelting* or metallurgical process (R. 193). In other words, depletion allowance, as recognized in the Internal Revenue Code, was permitted as to income from the *ordinary mining process,* but was *not permitted in connection with income from products to which value had been added by the smelting process.*

It should be noted here that, as mentioned above, tungsten was discovered, and a substantial amount of tungsten concentrates were produced at the mine, before the 1941 contract. The treatment process was "a combination of flotation and gravity concentration method * * * at the property" (R. 137). This is one of the processes that was included in the above Internal Revenue Code section among "the **ordinary** treatment processes" applied by mine owners or operators (see Judge Mathes' comments R. 246-248).

(7) THE "NET SMELTER RETURNS" CLAUSE

Extrinsic evidence throws light on the meaning and scope of this provision. It reads (R. 17):

"By *net smelter returns,* as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, *it being understood that the smelter will deduct its normal smelting charges* and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

(a) The Word "Normal".

The net smelter returns clause provides in part,

"it being understood that the smelter will deduct its *normal* smelting charges * * *"

The record shows that the word "normal" as to smelter charges was first introduced into the 1939 contract (R. 352-353). The testimony is that the word "normal" is in the handwriting of the witness who had represented the appellee in connection with the formation of both the 1939 and 1941 contracts (R. 233; see Def's Ex. 5a, R. 372-376).

It is uncontradicted that the word "normal" in connection with smelter charges and deductions is not and was not commonly used or customarily used in connection with the sale of concentrates to "outside smelters" or independent smelters (R. 160):

"Q. Is the word 'normal' customarily used in connection with the sale of concentrates to outside smelters?
A. No."

This portion of the 1939 contract was carried into the net smelter return clause in the 1941 contract (R. 17). *It is clearly apparent from the record that this insertion of "normal" as to smelting charges was made in connection with the contemplation of the parties that a smelter might be erected by Bradley* (R. 123, 124). In brief, the word "normal" was inserted as a "protective device so that we could not overcharge Oberbillig. * * * in the instance * * *

ing, for example, would perhaps not cover the actual mercury processing. You might have high grade ore that wouldn't be milled."

(c) "Produced from Said Properties".

Referring to the *"net revenue"* clause of the 1941 contract which contains the words *"produced from said properties"*, the uncontradicted testimony is that *in the mining industry these words have a special usage and meaning.* They mean materials produced by the mining process which includes extraction and the *"ordinary treatment process"* at the mining property (R. 199-204) at R. 204:

> "The product from the mine stops when the production process is complete so far as mining concentration terminology is concerned. It does not involve steps such as smelting that completely change the character and reduce the mined product to a metal."

In other words, the *product of a smelter* is **not,** in mining industry usage, *"a product of the properties"*.

For the first time, testimony—which was uncontradicted—clearly showed the customs and usage underlying the three royalty provisions, the surrounding circumstances, and the meaning and intent of the parties as to the *"net revenue"* provision applying to markets or customers (neither mint nor smelter) where no smelting treatment is involved.

See Judge Mathes' comment (R. 249):

> "The emphasis upon market is persuasive in the light of all of the other circumstances, that the parties have in mind here possible marketing methods, envisioning the possibility over the years, so they, as to anything marketable, in a condition to be marketed, the mint,—at the time they contracted the mint was the market. As to anything required to go to the smelter, the smelter was the market. **As to other matters, as to concentrates,**

ores, metals or values, the net revenue provision was intended as a catch-all,—another method of marketing direct from the property. In other words, by transporting the product directly from the mine to the mint whenever the quality would permit such a relatively simple operation; by sending it to the smelter to be processed in the customary way, and in the third place, by marketing ore concentrates and values direct to third persons from the mine, after the mining process had been completed. This evidence of custom and practice and other surrounding circumstances and subsequent conduct is not contradicted."

(9) PRACTICAL CONSTRUCTION—CONDUCT OF PARTIES.

We have already referred to the conduct of the parties as to the construction of the 1941 contract. Such matters as the acceptance by United of the "net smelter returns" method of computation for two years in connection with Bradley's Purification Plant at Boise, and the 1950 supplemental agreement, will also be discussed in the argument that follows.

Argument

I.

ANALYSIS OF UNITED'S POSITION

Appellant has made no effort or attempt to demonstrate in its opening brief on this appeal the basis for its specifications of error other than to say (a) that the District Court's findings and conclusions "are irrelevant and immaterial in view of this Court's decision of May 15, 1956"; (b) that the disputed portions of the contract are "clear, plain and unambiguous" making extrinsic evidence unnecessary; (c) that "all of the matters adduced by Bradley at the trial were mentioned, covered and dealt with in the contract itself"; and (d) that "Bradley at the trial of this

cause presented no matters which were not before this Court at the time of its opinion of May 15, 1956" (Appellant's Opening Brief, pp. 9-14).

These laconic statements are made by appellant despite the pre-trial, the pre-trial stipulations included in the pre-trial order, the findings of the District Court that the contract was *unclear* (R. 242) and the uncontradicted testimony above referred to in our Statement of Facts.[5]

Furthermore, as has been pointed out earlier, the ambiguity of the 1941 contract is quite apparent where the various judges of this Court and the District Court have differed—demonstrating that the contract is susceptible of different meanings, is ambiguous and evidence of extrinsic circumstances is therefore admissible.

At least *there is no question that the case was remanded to the District Court for trial with specific reference to the extrinsic evidence—offered as a matter of proof—by Bradley's petition for rehearing.*

Other than the citation of one case which is not in point and the above referred to contentions that the evidence and findings were immaterial, there is no specific presentation by United as to the admissibility or inadmissibility of the extrinsic evidence which was admitted at the trial.

Apparently appellant is relying solely in its appeal on two statements in the opinion written by Judge Denman (233 F.2d 205, 207).

The first refers to the "net smelter returns" clause and the statement in the opinion is "by its terms this clause is limited to situations where 'amounts are received [by Bradley] from [outside] smelters' ".

But as is shown by this record there is no basis whatever for the above bracketed insertions of "Bradley" and "out-

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(5) Whether Appellant has properly complied in its opening brief with this Court's Rule 18, Sec. 2(d) will be discussed later.

side". In the first place the pre-trial order in this case contains a *stipulation* of the parties as to the custom in effect at the time the contract was executed, as to intra-company accounting and settlements by companies and *by companies that owned both a mine and a smelter,* in connection with the furnishing of what are known as "net smelter returns" (R. 426-III-"S").

Secondly, the uncontradicted testimony is that erection of a smelter by *Bradley*—not by anyone else—was contemplated by the parties and it is to be noted that neither the appellant in its opening brief nor this Court's opinion of May 15, 1956, in its recital of the contract provisions, made any reference whatever to the pivotal clause in the contract (R. 18) clause *"should a smelter or other reduction works be erected* * * * then there should be deducted from the *net smelter or reduction returns* a fair charge for trucking * * *". But as shown earlier by the uncontradicted testimony, the key word "Bradley" must be inserted in this clause which definitely would permit Bradley to make an accounting to United under the "net smelter returns" clause if it erected a smelter. And this was borne out by the subsequent conduct of the parties i.e. the "net smelter returns" method used by Bradley, and accepted by United without objection, at Bradley's Purification Plant at Boise, Idaho.

United's main contention is that this Court, in its opinion of May 15, 1956, ruled out any applicability of the "net smelter returns" clause to the operations of the Yellow Pine Smelter (App. Br. p. 13). The comment of this Court relied on by United is "we see no reason why, as a matter of law, the 'net revenue' clause *could* not be controlling". United's position is clearly erroneous, because United fails to consider the additional portions of this Court's opinion which supply the reason for remanding the case. This Court said:

> "We see no reason why, as a matter of law, the 'net revenue' clause *could* not be controlling. The District

Court erred in granting summary judgment for Bradley. In its petition for a rehearing, following an earlier opinion for which this one has been substituted, Bradley urges that notwithstanding the views here expressed, as to the 'net revenue' clause, there remains untried an issue of fact in that there are relevant extrinsic circumstances of which it is prepared to offer evidence, as bearing on the meaning of the contract.

"Whether such extrinsic evidence is or would be admissible, or whether the writing, as drawn, so precisely fits the very circumstances here, involving amounts paid by purchasers from the sale of metals, that it must be said that all negotiations were "integrated" in the written instrument, must await decision following further hearing in the court below. (Citing Wigmore on Evidence, (3rd Ed.) Sec. 2430)."[6]

But this Court obviously did not make a holding that the "net revenue" clause *is* controlling. Such a determination

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(6) With reference to the comment on "integration" and to Wigmore, this is one of the familiar rules on admissibility of extrinsic evidence. The Court points out that extrinsic evidence is admissible on this question of integration. In addition there is the question of *interpretation.* This function of interpretation must be performed as indicated in the authorities cited herein. Even an "integrated" agreement is to be interpreted in the light of "all operative usages and all the circumstances prior to and contemporaneous with the making of the integration." See Restatement of Contracts, Section 230. And see the reference to 9 Wigmore on Evidence, 3rd Ed., 5, in this Court's decision in *Quon v. Niagara Fire Ins. Co. of New York,* 190 F.2d 256 (9 Cir.) where it was aptly said:

> "The writing under these circumstances must be viewed in its setting together with all the other evidence in light of the credibility accorded the witness. Here the writing is one of the collateral facts. * * *
>
> "Under such circumstances, the use of the cliche that the appellate court is in as good a position as the trial judge to construe a writing is futile."

See also the following portions of this brief for authorities that "upon the slightest ambiguity in the contract, extrinsic evidence is admissible in aid of construction."

would, we submit, be in effect the holding in its prior opinion of February 8, 1956, which was withdrawn after the filing of appellee's Petition for Rehearing and Motion for Modification under *Fountain v. Filson,* 336 U.S. 681.

It is therefore obvious that the "law of this case", as relied on by appellant, cannot be that the net revenue clause *is* controlling. Otherwise the remanding of the case for a "further hearing in the court below" would have given rise to the exact situation which was eliminated by this Court's withdrawal of its first opinion.

Why was the case remanded for a "further hearing" in the District Court? It was remanded for the specific purpose of having the District Court rule on the admissibility of the evidence offered by Bradley in its Petition for Rehearing *"bearing on the meaning of the contract"* and, if the District Court found such evidence admissible, to interpret the contract in light of it.

This the District Court has done. It considered certain evidence previously discussed herein and interpreted the agreement in its light. The record of the pre-trial order and the trial demonstrates that a great deal of extrinsic evidence was offered and admitted—often without objection of counsel. Significantly, appellant has not urged that the evidence does not support the findings, and such a contention would not be tenable since the evidence overwhelmingly demonstrates the soundness of the findings and judgment.

This Court in its opinion raised the direct question "whether such extrinsic evidence is or would be admissible". *We submit that appellant has either misread or ignored the real determination of this Court.* Appellant states that "the determination of this Court of May 15, 1956 was controlling in the lower Court and is controlling in this appeal" (App. Op. Br. p. 12).

Appellant also takes the incredible position—"The trial court followed Bradley's contentions, disregarding the opinion of this Court dated May 15, 1956" (App. Op. Br. p. 10). Apparently appellant believes that the pre-trial in February 1957, and the trial in March 1957 before Judge Mathes were completely uncalled for. Appellant does not even attempt to meet this question of admissibility of the extrinsic evidence admitted in the District Court, nor has appellant cited any authority whatever as to why such evidence should not have been admitted. *Appellant merely asserts its plainly mistaken view that the issue of admissibility was not before the District Court.*

Yet Judge Mathes early in the trial clearly pointed out to counsel for United that he considered the contract ambiguous, particularly as applied to the later Yellow Pine Smelter construction by Bradley. *He also referred to the matter of circumstances surrounding the execution of the 1941 contract* and the question of admissibility (R. 98-99).

II.

APPELLANT HAS NOT PRESENTED ANY ISSUE TO THE COURT AND HAS NOT COMPLIED WITH THE RULES OF THIS COURT.

While we have no desire to be unduly technical, we respectfully urge that the method in which Appellant has presented this appeal leaves no issue to be decided by this Court.

First, in the "Statement of Points" required under this Court's Rules, Appellant merely enumerates certain findings of fact, conclusions of law and portions of the judgment, claimed to be in error (R. 447-450).

Second, in the brief, appellant's specifications of error are a verbatim repetition of the "statement of points" (Appellant's Op. Br. pp. 6-8). These specifications state no

reason why any of the findings are in error and thus violate Rule 18(2) (d) of the rules of this Court, which provides:

> "* * * In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous * * *"

Third, the specifications are not stated separately; rather, each specification alleges more than one error. The first specification lumps no fewer than twenty alleged errors into one. "Specifications of error which set out more than one error are improper and need not be considered." *Thys Company v. Anglo California National Bank,* 219 F.2d 131, 132 (9 Cir.); *Mutual Life Ins. Co. of N. Y. v. Wells Fargo Bank & Union Trust Co.,* 86 F.2d 585, 587 (9 Cir.).

Fourth, the points raised are not stated before being discussed; appellant's "statement of issues" (Appellant's Br. pp. 8-9) is merely another blanket assertion of error. Again this violates the rules[7] and makes a clear understanding of appellant's contentions difficult. The *Thys Company* case, *supra,* is applicable. In it this Court said (219 F.2d at 132, 133):

> "Further, in disregard of the Rule, the particular points raised are not stated in full before being discussed, several allegedly erroneous findings of fact are joined under one heading for argument,[8] and there is a failure to state with particularity wherein some of them are thought to be erroneous."

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(7) Rule 18(2)(c) of this Court provides that appellant's brief shall contain:

> "A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised."

(8) In the present case appellant has joined *all* alleged errors under a single heading for argument.

We respectfully submit that such an almost complete disregard of this Court's rules justifies dismissal of the appeal. Again referring to the recent *Thys Company* decision (219 F.2d at 133):

> "Where, as here, the brief for an appellant exhibits a gross disregard of the requirements of our rules, a dismissal of his appeal is warranted."

Fifth, and perhaps most importantly, no issue as to whether the Court below properly admitted extrinsic evidence in interpreting the contract has been raised. Neither the specifications of error nor the statement of points claim that evidence was erroneously admitted, nor is there any reference to "the full substance of the evidence admitted", to "the grounds urged at the trial for the objection" or to the transcript pages where such evidence appears, as required by Rule 18(2)(d) of this Court.

Thus, appellant's presentation creates the following situation: There is no issue as to whether evidence was properly admitted[9] and we are even doubtful whether appellant intended to raise it since its brief does not give the substance of a single item of evidence which might be objectionable nor cite a single authority bearing on this issue. Appellant does not urge that the evidence does not support the findings, nor that the findings do not support the judgment. *There is therefore nothing before this Court except appellant's argument that the question as to which of the two clauses applied to the Yellow Pine Smelter were not to be decided by the Court below, despite this Court's explicit*

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(9) This Court has so held many times under similar circumstances, E.g., *State of Washington v. United States*, 214 F.2d 33, 44; *Cly v. United States*, 201 F.2d 806, 809; *Lii v. United States*, 198 F.2d 109, 111-112; *Ziegler v. United States*, 174 F.2d 439; *Western Nat. Ins. Co. v. Le Clare*, 163 F.2d 337, 340; *Thys Company v. Anglo California National Bank,* supra; *14 Cyc. Fed. Proc.* (3d ed.) 19.

direction to the contrary. This argument has already been considered.

The posture of the appeal constitutes a further reason for dismissing the appeal.

III.

EVIDENCE OF EXTRINSIC CIRCUMSTANCES IS ADMISSIBLE BECAUSE THE FACT THAT THREE COURTS HAVE REACHED OPPOSITE CONCLUSIONS ON THE MEANING OF THE CONTRACT SHOWS THAT IT IS SUSCEPTIBLE OF DIFFERENT MEANINGS AND THEREFORE AMBIGUOUS.

In *Salant v. Fox,* 271 Fed. 449, the Third Circuit said (p. 451):

> "If we had been the first called upon to interpret this contract we should have regarded its language as clear and unambiguous, and and have construed it accordingly; *but as the contract has been submitted to another court, it has given rise to three radically different interpretations, we must assume that its language is ambiguous and is susceptible of different meanings.*"

In *Davis v. Basalt Rock Co.,* 114 C.A. 2d 300, 250 P.2d 254 (hearing by California Supreme Court denied) it was said (p. 307):

> "We readily admit * * * that both sides frequently state that in many respects concerning the disputes between them, indeed in most, the contract was not ambiguous, but on the contrary clear, certain and not to be misunderstood. *Nevertheless, each side claimed that the contract clearly declared in the way they interpreted it, and just as clearly excluded the meaning contended for by the opposing side. Such a situation is a familiar one. Such a situation also lends support to a determination that a contract capable of stating so clearly such opposite things is sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation.*"

And see the recent California Supreme Court case of *Beneficial Etc. Ins. Co. v. Kurt Hitke & Co.,* 46 C.2d 517, 524, 525, 297 P.2d 428:

> "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties * * * not to show that 'the parties meant something other *than* what they said' but to show 'what they meant *by* what they said' * * *"
>
> "The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is clearly set forth in *Kenney v. Los Feliz Investment Co., Ltd.,* 121 Cal. App. 378, 386, 387 [9 P.2d 225], as follows: 'It is a settled rule that when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown (*Balfour v. Fresno C. & I. Co.,* 109 Cal. 221 [41 P.2d 876].'"

In the present case Circuit Judge Healy, sitting in the District Court, held that the contract on its face unambiguously meant what Bradley claims. This Court felt otherwise. Judge Mathes after pre-trial and trial reached the conclusion that the contract was unclear as to the main issue and rendered judgment for Bradley. The fact that the three courts differ shows that the contract is "sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation" and therefore we submit that the

extrinsic evidence adduced and uncontradicted at the trial not only fully supports the findings and judgment here but also is clearly such a "permissible aid" for the proper interpretation of the contract.

Both intellectual humility and logic lead to this conclusion. The term "ambiguity" in the sense of the rule under consideration merely means that the contract is "susceptible of several significations", *Salant v. Fox,* supra; that it is "capable of being understood in more senses than one", *Whiting Stoker Co. v. Chicago Stoker Corporation,* 171 F.2d 248, 250, 251 (7 Cir.), or that the "language used is fairly susceptible of two constructions" or *"any* doubt exists", *Barham v. Barham,* 33 Cal. 2d 416, 202 P.2d 289; or, as stated in *Twin Falls Orchard & Fruit Co. v. Salsbury,* 20 Ida. 110, 117 Pac. 118, 122, "there is room for doubt", or, as stated in *Stone v. Bradshaw,* 64 Ida. 152, 128 P.2d 844, "different minds might well reach different conclusions". California law and Idaho law concur and control. Here the matter is not open to surmise. Different minds *have* reached different conclusions.

This Court similarly held in *United States v. Dollar,* 196 F.2d 551, where it reversed a summary judgment in a case turning on the meaning of a contract. The same contract had been in issue in *Dollar v. Land* in the District of Columbia, where the District Court construed the contract one way but was reversed by the Court of Appeals, which gave it a different construction. This Court said:

> *"The facts and circumstances before the courts in the case decided in the District of Columbia Circuit were such that reasonable minds not only could, but did, draw from them opposing inferences as to the nature and effect of the transaction.* This being true the case was not one for summary disposition, but for trial and findings. *Detsch & Co. v. American Products Co.,* 9 Cir. 152 F.2d 473".

IV.

UPON THE SLIGHTEST AMBIGUITY IN A CONTRACT, EXTRINSIC EVIDENCE IS ADMISSIBLE IN AID OF CONSTRUCTION.

Under *Erie R. Co. v. Tompkins,* 304 U.S. 64, "the interpretation of the contract" must be decided according to state law. *Transcontinental Air v. Koppal,* 345 U.S. 653, 656.[10]

This contract was entered into between an Idaho and a California corporation. The record is not clear as to the time and place of its execution. Depending on whether the latest signature was in California or Idaho, it is a California or Idaho contract. But it is immaterial which, for the law of the two states on construction of contracts is the same, and, as the Court knows, Idaho decisions pattern themselves on California law. Since the California cases on this subject are among the most articulate in the nation, the matter may be lucidly stated by quoting from them.[11]

Usage and Custom

In *Body-Steffner Co. v. Flotill Products,* 63 C.A. 2d 555, 147 P.2d 84, which amasses the authorities on the subject

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(10) This Court had previously so held in *William S. Gray & Co. v. Western Borax Co.,* 99 F.2d 239, 242 (9 Cir., per Denman, C. J.). Accord: *Edward B. Marks Music Corporation v. Foullon,* 171 F.2d 905, 908 (2 Cir.).

(11) For pertinent Idaho decisions see *Haener v. Albro,* 73 Ida. 250, 249 P.2d 919, 925 (1952); *Williams v. Idaho Potato Starch Co.,* 73 Ida. 13, 245 P.2d 1045 (1952); *Stone v. Bradshaw,* 64 Ida. 152, 128 P.2d 844 (1944); *Twin Falls Orchard & Fruit Co. v. Salsbury,* 20 Ida. 110, 117 Pac. 118, 122 (1911); *Molyneux v. Twin Falls Canal Co.,* 54 Ida. 619, 35 P.2d 651, 654; *Wood River Power Co. v. Arkoosh,* 37 Ida. 348, 215 Pac. 975, 976, 977; *Caldwell State Bank v. First Nat. Bank,* 49 Ida. 110, 286 Pac. 360; *Johansen v. Looney,* 30 Ida. 123, 163 Pac. 303 (1913).

In *Williams v. Idaho Potato Starch Co.,* supra, a contract called for "a ten inch pump". As the Court said, this language was "clear on its face" but extrinsic evidence, if admitted, would show it to be in fact ambiguous:—"Upon the admission of this testimony, an ambiguity arises." The Court held the evidence admissible, and held further that "evidence of prior and contemporaneous negotiations" was admissible to remove the ambiguity.

and in turn is approved in *Union Oil Co. v. Union Sugar Co.*, 31 Cal. 2d 300, 188 P.2d 470, the Court succinctly stated two principles:

First (p. 558):

> "It is a rule of practically universal acceptation in common law jurisdictions that however clear and unambiguous the words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense."[12]

Extrinsic Evidence Apart from Custom

Second, as respects "introduction of evidence, apart from evidence of trade usage" (p. 561-562):

> "Where no extrinsic evidence is offered Courts are too frequently compelled to construe ambiguities and to reconcile inconsistencies by a consideration of the con-

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(12) The Court here cited Civil Code, Sec. 1644; Code Civ. Proc., Sec. 1861; Rest., Contracts, Sec. 246(a); 2 Williston on Sales, 2d Ed., Sec. 618, p. 1556; 3 Williston on Contracts, rev. ed., Sec. 648, pp. 1871-2, Sec. 650, pp. 1874-9; 9 Wigmore on Evidence, 3d Ed., Sec. 2463, p. 204; 25 C.J.S., Customs and Usages, Sec. 24, pp. 111-2; 17 C.J., Id., Sec. 61, pp. 498-9; 12 Am. Jur. Contracts, Sec. 237, pp. 762-3; note 89 A.L.R. p. 1228 et seq.

The Restatement of Contracts, Section 246(a), comment, states "The rule * * * is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear."

See decisions holding that every commercial contract is deemed to be entered into with the understanding that usage and custom in regard to the particular matter of the contract becomes a part of the transaction itself, unless the contrary appears: *Fischer v. First Nat. Bank of Sandpoint*, 55 Ida. 251, 40 P.2d 625; *Twin Falls Bank and Trust Co. v. Pringle*, 55 Ida. 451, 43 P.2d 515.

And see collected cases on usage and custom in recent case of *Beneficial Etc. v. Kurt Hitke & Co.*, 46 C.2d 524, 527; 297 P.2d 428.

> tracts on their face; but where extrinsic evidence is offered to explain inconsistent provisions in a contract *Courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.* 'The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when *any* doubt arises upon the true sense and meaning of the words themselves, or *any* difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself.' "

This Court has ruled the same way, even in the days before *Erie v. Tompkins* established that state law must be followed on non-federal questions. Thus, in *Consolidated Coppermines Corp. v. Nevada C. Copper Co.,* 64 F.2d 440 (adopting opinion in 44 F.2d 192, cer. den. 290 U.S. 664), a mining case like the present, on the basis of extrinsic evidence this Court affirmed a judgment construing contract words, "all of the ore", to mean only all underground ore and not shovel-mined ore; i.e., that it did not in fact mean "*all* the ore".

The United States Supreme Court has long held that resort may always be had to the circumstances in which the contract was made. *Lowrey v. Hawaii,* 206 U.S. 206, 218, 219-222; *United States v. Bethlehem Steel Co.,* 205 U.S. 105, 117-118; *Harton v. Loffler,* 212 U.S. 397, 404.

In fact, there is a great body of outstanding authority that extrinsic evidence is always admissible whether a contract is ambiguous on its face or not. *United States v. Bethlehem Steel Co.,* supra, is noted in *United States v. Lennox Metal*

Manufacturing Co. 225 F.2d 302 (2 Cir. 1955), as so holding, as are California decisions, Corbin on Contracts and 9 Wigmore on Evidence (3rd Ed.), Sec. 2461, et seq.[13] Thus Professor Corbin, in the latest and most thorough treatise on the subject, inquires whether "words (are) ever so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation" and doubts that they are (3 Corbin on Contracts, Sec. 542, p. 66). He states that cases so holding "should be subjected to constant attack and disapproval" because "it is easy to jump to a conclusion" (3 Corbin p. 71).

But without going so far, the Courts almost universally agree, in the language of the *Body-Steffner* case, that if there is the least sign of ambiguity, then extrinsic evidence should be admitted and that the Court should not strain to find absence of ambiguity. Thus in *United States v. Lennox Manufacturing Co.,* 225 F.2d 302 (2 Cir. 1955), it is said:

"* * * even those Courts which still say ambiguity is a

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(13) The *Lennox* case states:

"The 'ambiguity-on-its-face' rule is a vestigial remain of a notion prevailing in 'primitive law' * * * (310)

"Even if a word in a written agreement is not ambiguous on its face, the better authorities hold that its context, its 'environment', must be taken into account in deciding what the parties mutually had in mind when they used that verbal symbol.

"The problem of intepreting a contract is, of course, that of understanding the communication between the parties * * * (310). Judge Learned Hand has sagely warned that, in attempting a solution, it is 'one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary * * * (311) * * * 'The law requires the Court to put itself as nearly as possible in the position of the parties, with their knowledge and their ignorance, with their language and their usage. It is the meaning * * * of the parties, thus determined, that must be given legal effect.' "

In *Body-Steffner Co. v. Flotill Products,* 63 C.A. 2d 555, 562, 147 P.2d 84, the Court similarly said:

"There is a considerable body of opinion among students of the subject whose conclusions are entitled to the greatest

necessary condition of considering such extrinsic evidence are quick to find such ambiguity, on slight grounds, when the extrinsic evidence is convincing." (313)

In *Barham v. Barham,* 33 Cal. 2d 416, 202 P.2d 289, the Supreme Court of California sums up the rules of interpretation:

> "Where *any doubt* exists as to the purport of the parties' dealings as expressed in the wording of their contract, the Court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement (citation)—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting' (citation).[14]"

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respect that parol evidenee should always be admissible to show the sense in which the contracting parties used and understood the language of their written contracts."

See also *Wells v. Wells,* 74 C.A. 2d 449, 169 Pac. 2d 23 and *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 306, 188 Pac. 2d 470, which cites, in support of the view that "extrinsic evidence is generally admissible to show the sense in which the parties used language embodied in the contract, whether or not the words appear ambiguous to the reader", *Universal Sales Corp. v. California etc. Mfg. Co.,* 200 Cal. 2d 751, 776, 128 P.2d 665; Rest. Contracts, Sec. 242, comment a; Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 420; 9 Wigmore on Evidenee (3d Ed.) Sections 2458-2478; McBaine, The Rule Against Disturbing Plain Meaning of Writings, 31 Cal. L. Rev. 145.

(14) Compare the reeent deeision of the Court of Claims in *Blackburn v. United States,* 116 F. Supp. 584, 586 (1953) where a summary judgment was denied, the Court saying:

> "The language inserted in the contract is by no means so clear, *if language ever is so clear,* as to make inadmissible evidence as to what the parties to the contract intended it to mean. That intention, if it is mutual, is the essence of any contract, and the parties to it are privileged to use whatever form of shorthand, code, trade, ungrammatical, or other expression they may hit upon. They may make trouble for themselves and for a Court by their unorthodox expression, but they do not forfeit their rights."

V.

PRACTICAL CONSTRUCTION OF CONTRACT BY THE PARTIES' CONDUCT.

No rule of interpretation is better settled than that the construction placed on a contract by the acts and conduct of the parties is entitled to great weight and will, when reasonable, be adopted and enforced by the courts. See *Beneficial Etc. Ins. Co. v. Kurt Hitke & Co.,* 46 C.2d 524, 527; 297 P.2d 428:

> "To this latter point, it is said that 'a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.' (*Woodbine v. Van Horn,* 29 Cal. 2d 95, 104 [173 P.2d 17] * * *"
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> "It should be clear, therefore, that extrinsic evidence was admissible here as an aid in construing the contract. The meaning given by the parties to the contract since its existence and their performance thereunder, the preliminary negotiations and the question of whether custom and usage in the insurance business has given meaning to the terms of the contract are all relevant to the interpretation of it and should enable the trial court to ascertain the meaning of the contract."

See also *Barham v. Barham,* 33 Cal. 2d 416 at 423; 202 P.2d 289; *Tanner v. Title Ins. & Trust Co.,* 20 Cal. 2d 814, 823; 129 P.2d 383; *Cottle v. Oregon Mut. Life Ins. Co.,* 60 Ida. 628, 94 P.2d 1079; Williston on Contracts, Secs. 623, 629. Thus in *Frank v. Bauer,* 19 Colo. App. 445, 75 Pac. 930, the court said (p. 932):

> "* * * the parties themselves construed the contract in this respect by paying royalty upon the value of the ore at the smelter, *less smelting charges.* They thus defined the meaning of the words 'mint or smelter returns,' and

this interpretation, in the absence of other evidence, we are justified in accepting."

(1) Boise Purification Plant.

Without any objection as to admissibility extrinsic evidence was introduced as set forth in the above statement of facts as to the erection by Bradley of its own purification plant in Boise. Tungsten concentrates derived from the ordinary mining process at the mining properties were processed through this plant at Boise in order to make them marketable. This operation continued from 1943 to 1945. The testimony is clear and uncontradicted that the type of treatment at the Boise Purification Plant was beyond the ordinary treatment processes normally applied by mine operators.

Bradley deducted its costs of operating this plant before calculating appellant's royalty on the proceeds. Its accounting to United showed exactly what it did, and appellant accepted the practice and accounting as proper (R. 142, 145, 152). *This was, as has been shown, the basis of accounting under the "net smelter returns method".*

This clearly demonstrates that United did not consider itself entitled to royalty on that part of the "amount paid by any purchaser" which was due to added value created by Bradley's activity and expenditures not within the ordinary treatment processes of a mining operation. This practical construction of the contract by the parties' conduct occurred *after* the 1941 contract. It continued for a two year period and before the erection of the Yellow Pine Smelter by Bradley at the property.

The whole Boise Purification Plant picture and accounting methods unquestionably show the conduct of the parties bearing on the construction of the contract as to the royalty provisions, and the propriety of Bradley's deduc-

tion of smelting charges and accounting to United on a *net smelter return* basis as to concentrates processed at Bradley's Yellow Pine smelter.

(2) The 1950 Contract.

As set forth in the statement of facts, the parties entered into an agreement on July 20, 1950 (R. 337-381). The uncontradicted evidence (R. 173-175), particularly as to recitals shows that the "royalties due" to appellant for the particular period mentioned were computed according to the *net smelter returns* method.

(3) No Objection to Computation of Royalties for Approximately Two Years After Smelter Construction.

The record is uncontradicted that no one representing United ever objected to the method by which Bradley had been computing royalties on materials that went through the Yellow Pine smelter, i.e., on the *net smelter returns method*—for a period of approximately two years (R. 178, 179).

VI.

THE CONSTRUCTION OF A CONTRACT IS PRIMARILY THE FUNCTION OF THE TRIAL COURT.

The function of an appellate court is merely to review such construction of a contract, not to act *ab initio*. After the introduction of evidence at a trial, the District Court reached a construction. On appeal from *that* judgment, this Court's task is to determine whether the evidence adduced, *added* to the face of the contract, was sufficient support for the decision, and to determine whether or not the findings are "clearly erroneous."[15]

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(15) Rule 52(a) Federal Rules of Civil Procedure.

As said by this Court in *Hycon Manufacturing Company v. H. Koch & Sons,* 219 F.2d 353, 355 (9 Cir.):

> "No authority is given except to District Courts to make new findings of fact. Presently our sole function * * * is to re-examine judicially, criticize and set aside if 'clearly erroneous'. The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law."

In *Arnstein v. Porter,* 154 F.2d 464, 474 (2 Cir.), it was said that one must not

> "convert an appellate court into a trial court. The avowed purpose of those who sponsored the summary judgment practices was to eliminate needless trials * * * In the attempt to apply that reform—to avoid what is alleged to be a needless trial in a trial court—we should not conduct a trial in this court. Where the facts are thus in real dispute, *it is our function, after a trial in the lower court, to review its legal conclusions and, with reference to its findings of fact, to determine* **not** *whether we would ourselves have made them, but merely whether they rest on sufficient evidence in the record* * * * in reviewing a judgment * * * ours must be a limited function. This is not, and must not be, a trial court. Such a court has a duty more difficult and important than ours."

Construction of a contract with the aid of extrinsic evidence is a matter of inferences. Inferences are themselves facts, and a trial court's findings thereon, like any other findings, are controlling unless clearly erroneous. *Walling v. General Industries Co.,* 330 U.S. 545, 550; *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 35. This Court has said that "any attempt on the part of the appellate court to draw an inference of fact [contrary to one not clearly erroneous] constitutes a 'ursurpation of the province of the trial

court' ". *United States v. Fotopulos,* 180 F.2d 631, 635 (9 Cir.). And see *Estate of Bristol,* 23 Cal. 2d 221, 143 P.2d 689, and *Estate of Rule,* 25 Cal. 2d 1, 152 P.2d 1003, where it is said that an appellate court may not supplant the trial court's interpretation of a contract where extrinsic evidence has been received which permits diverse inferences.

The Supreme Court's Advisory Committee praises this Court's decision in *Quon v. Niagara Fire Ins. Co. of New York,* 190 F.2d 257 (9 Cir.)[16] where it was aptly said:

> "The writing under these circumstances must be viewed in its setting together with all the other evidence in light of the credibility accorded the witness. Here the writing is one of the collateral facts. * * *"
>
> "Under such circumstances, the use of the cliche that the appellate court is in as good a position as the trial judge to construe a writing is futile. The maxim is not true, as often happens with stereotyped sayings, in this situation. Here the construction entered into a finding of fact which cannot be set aside unless clearly erroneous. *In attributing imperative influence to a writing, courts would be reverting to the authoritarian doctrine of medieval scholasticism.* Wigmore's language made a destructive criticism of this view: '* * * a writing is, of itself alone considered, nothing,—simply nothing. It must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has. * * * There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it.' 9 Wigmore on Evidence, 3rd Ed., 5."[17]

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(16) Report of October 1955, p. 53, comment under proposed amendment to Rule 52.

(17) Numerous other decisions of this Court can be cited on the limited function of an appellate court. E.g., *Waialua Agr. Co. v. Maneja,* 178 F.2d 603; *Helbush v. Finkle,* 170 F.2d 41; *Paramount Pest Control Service v. Brewer,* 170 F.2d 553; *Jacuzzi Bros. v. Berkeley Pump Co.,* 191 F.2d 632, 637.

property included a cyanidation plant to produce gold bullion to be sent to the U. S. Mint.

Prior to 1939, the property was known to contain **mercury** (quicksilver or cinnabar). Again the record shows that the *cinnabar ore is not sent to a smelter*—the crushed ore is merely roasted or furnaced to produce the metal mercury (quicksilver).

The evidence has shown that, in the industry, "mining" is understood to include every step from the extraction of ore through crushing, milling, concentrating and some simple treatment processes. *But it has never been deemed to include smelting.* As reflected in the 1939 Internal Revenue Code, and as testified to, the miner commonly owns and operates a mill and concentrator, but he almost never owns or operates the smelter. *Crushing and concentrating are "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product."* **Smelting is not.**

Section 114(b)(4)B of the Internal Revenue Code of 1939[19] specifically defines income from mining property in reference to depreciation and depletion allowances. The parties discussed depletion prior to execution of the 1941 contract. We quote:

> "As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein shall be considered to include not merely extraction of the ores or minerals from the ground but also *ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketably mineral product or products,* and so much of the transportation of ores

(19) We quote the Internal Revenue Code of 1939 because it was the text in effect when the contract was made. The comparable provisions of the Internal Revenue Code of 1954 are in Section 613(c) and are the same except for paragraphing.

or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto. * * * The term 'ordinary treatment processes' as used herein shall include the following: * * * (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product —crushing, grinding and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (*but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining*), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, **including the furnacing of quicksilver ores.**"

The simple fact is that a pound of metal content in a mass of concentrates is not worth the same as a pound of refined metal as it comes from a smelter. The value of the refined metal is composed of two elements, (1) the value taken from the mining property, and (2) an additional value imparted to it by the smelter in refining it at the cost of labor, power, supplies and investment of capital.

The words "net revenue from the properties" or "values from the properties" cover element No. 1. They cannot include element No. 2.

(2) Purpose of Net Revenue Provision.

The record now shows the emphasis on a *market*—the sources of revenue on which royalties would be computed. As has been shown, the market is sometimes a mint and sometimes a smelter. It is also *uncontradicted that the "net revenue" clause has and was intended to have a "catch-all"*

application to various situations where smelting is not involved.

It will be recalled that in the Fall of 1941 and prior to the execution of the December 31, 1941 agreement, substantial sales of unsmelted tungsten concentrates were made to purchasers and consumers. It is now clear from the record that under the circumstances the parties were defining a marketing situation which did not involve the smelter process. The emphasis on the *market* is also seen in the contract itself (R. 17, 18) where the sources of revenue are referred to three different times as "smelter, *market* or mint."

The circumstances as to how the "net revenue" clause was placed in the contract and the reasons therefor have already been set forth in reference to the uncontradicted testimony. The parties at the time knew of the various materials extracted from the properties that would not have to be subjected to the "extraordinary" process of smelting, *i.e., "we were hunting for a clause that would cover products that would not go to a mint, such as gold bullion, or sulphide concentrates that would go to a smelter."*

Certain closely analogous situations may be noted. In *Helvering v. Bankline Oil Co.,* 303 U.S. 362 (reversing this Court), the Supreme Court refused to allow a percentage depletion based on the entire proceeds from the sale of casinghead gasoline. Only part of the value came from the "mining". The rest was from refining.[20]

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(20) *Danciger Oil etc. Co. v. Hamill Drilling Co.,* 171 S.W. 2d 321, 141 Tex. 153, "involved the construction of an oil and gas mining contract". Buying an oil lease interest, Danciger promised to pay a certain percentage "of all the oil, gas, casinghead gas and other minerals produced, saved and marketed * * * from the properties * * * *free and clear of operating expenses* * * *" Then Danciger built an absorption of distillation plant on the premises to separate the gas into its component parts. The issue was whether the royalty was to be paid on the receipts of the products manufactured from the gas, without any deduction for the cost of processing

VIII.

THE NET SMELTER RETURNS PROVISION

At the outset, we saw that the issue of contract construction is this:

> Is United to get the same royalty when the concentrates go through a smelter owned by Bradley on the premises as if they went through an independently owned smelter, **or** *is it to get a greater royalty merely because the smelter is owned by Bradley?*

(1) United's Construction Writes Words into the Contract.

Under Bradley's interpretation, the word "smelter" in the phrase "net smelter returns" encompasses *any* smelter. United's construction writes into the phrase the words "independently owned" or "third party owned" so as to make it read "net independently-owned smelter returns". The contract defines "net smelter returns" thus (R. 17):

> "By *net smelter returns,* as used herein, is meant the amount received from *the* smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that *the* smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

United's construction changes the phrase "amount received from *the* smelter" to the phrase "amount received from *any independently owned smelter*".

This Court's opinion *also* writes in words, by saying that the "net smelter returns clause" is "by its terms * * * lim-

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the gas into gasoline and other products. The Supreme Court of Texas, reversing the lower Courts, held no, stating (p. 322) that the royalty owner was not entitled to a share of the values added by a manufacturing process.

To the same effect is *Armstrong v. Skelly Oil Co.,* 55 F.2d 1066 (5 Cir.).

ited to situations where the 'amounts are received [by Bradley] from [outside] smelters.'" Those words in brackets are not in the contract.

In *Union Oil Co. v. Union Sugar Co.,* 31 Cal. 2d 300, 188 P.2d 470, the trial court had held that on its face a contract calling for certain action should be read as if it contained the words "in any event". The Supreme Court of California reversed, observing (p. 306):

> "Once something had to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining 'to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.' (*Body-Steffner Co. v. Flotill Products,* 63 C.A. 2d 555, 562 [147 P. 2d 84].)"

(2) United's Construction Makes the Entire "Net Smelter Return" Clause a Superfluity.

United contends that no smelter charges are deductible where Bradley owns the smelter because it is the "net revenue" clause that then applies. The reasoning behind this contention is that where Bradley owns the smelter it "receives" nothing from the smelter and so there are no "smelter returns".

But this construction reads the "net smelter" provision completely out of the contract as wholly superfluous.

Extracted from their matrix in industry usage, the phrases "smelter charges" and "net smelter returns" connote that a commercial or independently-owned smelter engages in the business of performing a service job for which it charges a toll or fee, returning to the owner of the concentrates the refined material less the charge for the service of refining. But the extrinsic evidence shows the

custom that independent smelters do "not charge a fee for performance of a service" and that, instead, they buy the concentrates and pay a purchase price. The concentrates become the property of the independent smelters (Finding XIII, R. 44).

Thus what is "received" from an independent smelter is simply *revenue*. If the "net smelter returns" clause is confined to independently owned smelters, that clause becomes a superfluity, for it adds nothing whatever to the "net revenue" clause, quoted above. Exactly the same revenue would be paid to United under the "net revenue" clause on concentrates going to an independent smelter as under the "net smelter returns" clause. But it is elementary, in every common law jurisdiction, that

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause helping to interpret the other." (Cal. Civ. Code, Sec. 1641. Cf. Restatement of Contracts, Sec. 235 (c)).[21]

In order, then, for the "net smelter returns" clause to have any office or function, it must apply to a smelter owned by Bradley.

(3) United's Construction Writes Out of the Net Smelter Return Clause a Significant Part.

Let us quote again the "net smelter return" clause. It reads (R. 17):

> "By *net smelter returns,* as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a

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(21) Accord: 3 Williston on Contracts 1779 (Rev. ed. 1936); 3 Corbin on Contracts 100 (1951); *Bratton v. Morris,* 54 Ida. 743, 37 P.2d 1097, 1100 (1934); *Molyneux v. Twin Falls Canal Co.,* 54 Ida. 619, 35 P.2d 651, 653 (1934); *Caldwell State Bank v. First Nat. Bank,* 49 Ida. 110, 286 Pac. 360, 362 (1930).

> smelter, *it being understood that the smelter will deduct its normal smelting charges* and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

Note the words, "it being understood that the smelter will deduct its **normal** smelting charges". If the "net smelter returns" clause applies only when the smelting is done by an independent smelter, these words are superfluous, for the amount received from the smelter is what it will pay. *Its* "deductions" would not be in the control of the parties.

The extrinsic evidence shows how these words got into the contract.[22] In 1939 the parties entered into an option agreement, in which the "net smelter clause" first appeared. At that time the parties contemplated the possibility of a smelter on the property, for the same option agreement, in the very sentence preceding this definition of net smelter returns, refers to the possibility of "local reduction of the concentrates." Early drafts contained the clause "it being understood that the smelter will deduct its smelting charges". This addition, as to *"normal"* smelting charges, *is appropriate to the situation of a smelter operated by appellee.* **And this is underscored by the fact that the early drafts did not contain the limiting adjective "normal" before "smelter charges".** The final insertion of the word "normal" was to protect appellant against appellee charging for smelting more than independent smelters were accustomed

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(22) "A contract may be explained by reference to the circumstances under which it was made * * *" (Cal. Civil Code, Sec. 1647). "For the proper construction of an instrument, the circumstances under which it was made * * * may also be shown, so that the judge be placed in the position of those whose language he is to interpret." (Cal. Code of Civil Procedure, Sec. 1860). These provisions are not merely California law, they are law generally. Restatement of the Law of Contracts, Sec. 235(d); 3 Williston on Contracts 1780 (rev. Ed. 1936); 3 Corbin on Contracts 17 (1951); Rudeen v. Howell, 71 Idaho 365, 283 P. 2d 587, 589 (1955) and cases cited therein.

to do in the industry. This is completely borne out by the record.

Judge Mathes, we submit, has aptly summarized the significance and application of the net royalty clauses (R. 250):

> "It is my view that the Plaintiff's construction would read the net smelter returns provision out of the contract, since the net revenue clause is general and covers everything not otherwise covered. If the net revenue clause is not the general catch-all then there is no explanation for having the mint and the smelter returns clauses in the contract, they are specific and apear to limit or control the general,—by the net revenue is meant the amount paid by the purchaser from the sale of concentrate, any purchaser. It is broad enough, as pointed out this morning, to cover whatever is covered by the net mint returns and whatever is covered by the net smelter returns. In any event, the plaintiff's construction would read out of the net smelter returns clause the phrase, it being understood that the smelter will deduct its normal smelting charge and charges for railroad, freight, and so forth,—it wouldn't read out the freight provision, of course, but it would read out the smelting charge provision, or it would necessarily read into the clause the words 'third-party owned smelter', or something of like effect. If the smelter was not owned by one of the parties to the contract then it had to be a third-party owned smelter."

(4) In Industry Usage "Net Smelter Returns Received" Means Returns "Realized".

United has contended in this case that the "net smelter clause" refers to "net smelter returns *received*", that the word "received" connotes payment by a third party, and therefore that the "net smelter" clause is not applicable to a smelter owned by appellee. And that is also suggested in this Court's opinion of May 15, 1956.

We therefore note a contrast on the face of the writing that calls for explanation by extrinsic circumstances. The three definitions, of "net smelter returns", "net revenue" and "net mint returns", appear consecutively (R. 17). Net revenue is defined as "the amount *paid by any purchaser";* net mint returns are defined as "the amount *paid*" by a mint. Thus where the parties meant to refer to a purchase price *paid* by a third party, they knew how to say so explicitly. Yet, in the same context, in speaking of smelter returns, they do not say "amount paid by the smelter". They say "amount *received* from the smelter." The deliberate change in language must and does have a significance.

The explanation of the significance here, as elsewhere, lies in industry usage.

As long ago as 1898 and 1903, in Colorado, it was held that "smelter returns" in a royalty contract mean "return from the ore, less the smelting charges." *Frank v. Bauer,* 19 Colo. App. 445, 75 Pac. 930, 932.[23] and in *Maloney v. Love,* 11 Colo. App. 288, 52 Pac. 1029, the court said of the words "net proceeds from all smelter * * * and mill returns"

> "every miner and every person familiar with transactions involving leases of mining property knows exactly what they mean. They mean that * * * charges for treatment are to come out of the gross mill or smelter values, and what is left is net proceeds."

In short, the uncontradicted evidence of industry usage shows that "net smelter returns received" do not imply payment by a third party. The evidence is that these words are used in the industry to signify the net *realization* after smelting, whether by way of cash paid or credit given.

In the past, United's reasoning has been that where Brad-

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(23) The court there commented that evidence of "any custom defining the meaning of these words" would be admissible.

ley owns the smelter it "receives" nothing from the smelter and therefore there are no "smelter returns". The uncontradicted testimony as to the custom and usage in the mining industry fully refutes this reasoning (R. 129, 130).

The stipulation by the parties (R. 426) as to the custom of accounting where the smelter and the mine are under the same ownership, we submit, gives complete validity to the manner of accounting followed by Bradley.

It is uncontradicted that Bradley in its computation of royalties from the Yellow Pine smelter operation made its accounting to United on the same basis as an independent smelter—which actually resulted in a benefit to United (See the fully supported Findings of Fact, XLI at R. 61):

> "That the defendant has computed and paid royalties to the plaintiff upon products of the mine treated and processed by the defendant at the Yellow Pine Smelter on the same basis and utilizing the same treatment schedule, but without deducting freight charges, as in the case of identical concentrates shipped to outside smelters; the net effect being that plaintiff benefited in royalty payments when identical concentrates were smelted by the defendant at the Yellow Pine Smelter as compared with the best arrangement that could be made with an independently owned smelter; and the plaintiff did not object to the payment of such royalties by the defendant upon the basis of 'net smelter returns' until 1951."

IX.

CONTEMPLATION OF BRADLEY SMELTER

And now let us quote again the smelter royalty provision which is not mentioned in this Court's opinion nor in United's opening brief. Yet this is a key clause in the light of the uncontradicted testimony (R. 18).

> "Should a smelter or other reduction works be erected between the mining property herein conveyed

> and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works."

In the light of the record, this paragraph would now read: "Should a *Bradley* smelter be erected * * * *there shall be deducted from the net smelter or reduction returns* a fair charge for trucking * * *".

This is also the clue in the other net smelter returns provision—"*it being understood that* **the** *smelter will deduct its normal smelting charge*" i.e. whether **the** smelter is an outside smelter or owned by Bradley.

The extrinsic evidence shows how these words got into the contract.[24] It will be further noted that the contract of 1941 contains a provision relative to *trucking costs* "should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho". In that event "there shall be deducted from the net smelter or reduction returns *a fair charge for trucking* from the mine to such smelter or reduction works" (R. 18). The phraseology is noteworthy. It does not merely allow the deduction of a trucking charge; *the deduction is to be from the "smelter returns".*

Again, it is now clear that the smelter in contemplation in 1941 was *only* a Bradley smelter. Thus, spelling out the provision in the light of the uncontradicted testimony, the clause reads

> "* * * Should a **Bradley** *smelter be erected* * * * *there shall be deducted from* **Bradley's** *net smelter or reduction returns* * * * *a fair charge for trucking* * * * from the mine to **Bradley's** smelter or reduction works."

United's claimed construction is also contrary to the admitted purpose in making the change in contracts. The pur-

(24) See Footnote 22, supra.

pose of Bradley was to obtain a reduction of the 1939 contract royalty rates; the purpose of United in agreeing to lower royalties was to make it economically feasible for Bradley to mine low grade ore. United's construction runs directly counter to the avowed reasons for the change to the 1941 contract (Finding XXVI, R. 52).

We believe we need make no further comment on the uncontradicted testimony as to the construction of the contract by the conduct of the parties.

CONCLUSION

In this action a summary judgment for Bradley was reversed by this Court and the case was remanded to the District Court for the specific purpose of a hearing of extrinsic evidence—offered by Bradley in its Petition for Rehearing and Modification—as "bearing on the meaning of the contract." This Court's direction was therefore that a trial be had on the merits as to the construction of the contract subject to the rules as to admissibility.

The record of uncontradicted testimony, we submit, goes even beyond Bradley's offer of proof referred to in this Court's opinion. Extrinsic evidence was introduced, received as admissible testimony—was uncontradicted—and stands without rebuttal. It is submitted that the extrinsic evidence not only fully supports the findings and judgment but is clearly a "permissible aid" to the proper interpretation of the contract, pursuant to the authorities cited herein.

APPENDIX

DISTRICT COURT COMMENTS FROM BENCH AFTER TRIAL AND ARGUMENTS OF COUNSEL

The Court: The contract is admitted and the salient features that we are involved with are, of course, as set forth on pages 15 to 18 of the record on appeal, which is excerpted from Exhibit Seven here.

We bear in mind that the contract was made in 1941 and the smelter built in 1949. Our problem here is to ascertain the intention of the parties as manifested by the writing when read in the light of the facts and circumstances in evidence surrounding execution. The controversy arises, of course, because the contract is unclear as applies to this subsequently constructed smelter operation on the property, although admittedly the contract contemplated the possibility. It did not literally in so many words cover the contingency of the smelter on the property owned and operated by one of the parties to the contract.

It is stipulated, of course, at Q on Page six of the Pretrial Conference Order: "That, if under the terms of the contract, defendant, Bradley Mining Company, is entitled to make any charge or deduction for smelting ores in the Yellow Pine Smelter, the charges and deductions so made by Bradley Mining Company have been proper charges and deductions, and all settlements made with the plaintiff have been correct."

"If it is ultimately determined that the net smelter returns provisions of the agreement is applicable to the operations of the Yellow Pine Smelter for ores, concentrates, metals and values taken from the claims described in the agreement, then the settlement made by Bradley have been correct as to the minerals, ores, metals and value processed at the smelter."

"That there is no dispute as to the meaning and interpretation of the net mint return clause of the contract." That appears under R, at the top of page seven of the Pretrial Conference Order.

I find that this contract was made by experienced mining people, including the principal draftsman,—I say principal, at least it appears in the record to be a fair inference that Mr. Worthwine was the principal draftsman, and a party interested in the contract, and the performance of it as it turned out, so I find that the parties contracted with reference to the practices and customs in the mining industry prevailing at that time and as they envisioned such might be over the years. I think one significant fact that we may be inclined to forget at times, and one that should be kept constantly in mind, these parties envisioned this arrangement to last for ten centuries. That is a bold undertaking. I would hate to be called upon to envision what may be going on in the mining industry in the year 2000, much less the year 2900 and something, nine centuries later, but it is admitted under S, at Page seven of the Pretrial Conference Order: "That before 1939 and thereafter at all times material to this action, it was the practice and custom in the smelting industry for companies who own and operate smelters to also own and operate mines; that it was likewise the practice and custom in the industry for companies owning mines and also owning smelters to ship their mine produce to their own smelters; that it was likewise the practice and custom with respect to owners of smelters and mines, to also lease mining properties from other independent owners, and send the produce extracted therefrom to their own smelters and to settle for the product so shipped on the same basis as such smelting companies would settle with independent or custom shippers; that it was a practice

and custom of the trade that where the ores treated came from mines owned by the owners of smelters, or came from mines leased and mined by the smelter owner or came from independent custom shippers, that the smelting charge and the cost of transportation of concentrates to the smelter were deducted to arrive at a net amount commonly referred to in the mining and smelting industries as net smelter returns."

Under T on Page seven it is stipulated: "That it is a matter of common knowledge and historically recognized in the mining industry that the milling of ores to reduce such ores to a concentrate form is a part of the mining process, and that the smelting of ores is not a part of the mining process."

There has been evidence of other customs and practices in the mining industry, that evidence stands uncontradicted. The other surrounding facts and circumstances siding in the interpretation are the 1939 agreement, Exhibit 5, and the provisions of that agreement, and it is uncontradicted that one of the purposes of the 1941 agreement was to reduce the amount of royalty required to be paid by the defendant, and, as it has been developed here in our discussions today, the defendant's purpose to get a reduction in royalty, for obvious economic reasons the plaintiff was moved to grant it because the plaintiff's purpose thereby was to induce defendant to a more intensive mining of the ores, particularly the low-grade ores on the property, or which might thereafter be found on the property. Having in mind again that this five percent arrangement was to last for a thousand years and even longer if paying values were found. As I have said before, it is uncontradicted that the possibility that the defendant might build a smelter at the site of the mine was discussed during the negotiations of the 1941

contract, and it is admitted that under P of the Pretrial Conference Order at Page six: "That at the time of the execution of the contract, December 31, 1941, there were no smelters located at Cascade, Idaho." The contract itself, as was developed this morning envisages the possibility of a smelter near the mine and it was conceded in argument that that referred to the possibility that the defendant itself might build a smelter at or near the mining property. The provision in question appears at Page 18 of the Transcript of the record, and reads: "Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the *net smelter* or reduction returns, a fair charge for trucking from the mine to such smelter or reduction works."

I have already referred to the custom and practice with respect to the operation of smelters. The parties contracted in the light of that practice. There is uncontradicted evidence that tax problems were discussed during the negotiation of the 1941 agreement, including the problem of depletion, and it seems a fair inference that the parties did contract with respect to these tax problems existing and possibly contemplated for the future end, of course, it will be assumed that they contracted with reference to existing laws. The Internal Revenue Code of 1939 at that time, specifically Section 114 (b) (4) (B) made provision for depletion allowances computed upon gross income from the property to mean the *gross income from mining.* The Statute defined the term "mining", "to include not merely the extraction of the ores or minerals from the ground but also the *ordinary* treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by

common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto", and then the statute proceeds and defines the ordinary treatment processes incident to mines, and states: "The term 'ordinary treatment processes', as used herein, shall include the following", in the case of many minerals, including gold and silver, "which are not customarily sold in the form of crude mineral products,—crushing, grinding and beneficiation by concentration, such as gravity, flotation, amalgamation, electrostatic, or magnetic, cyanidation, leaching, crystallization, precipitation (*but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining*)", and continuing "or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores." The statute thus attempts to define the ordinary treatment processes normally applied by mine owners in order to obtain a commercially marketable mineral product. Of course, when when that product is obtained, that is the point at which the computation must begin for the purposes of depletion, or to put it another way, in computing the gross income from mining an operator may not proceed beyond these ordinary treatment processes, or he may not count the income,—beyond the ordinary treatment processes normally applied in order to obtain a commercially marketable product. Thus, in the case of *Helvering v. The Bankline Oil Company,* 303 U.S., Page 262, that was a case in which the Court refused to allow the depletion based on the sale of the end product because that included some refining processes beyond the ordinary treatment processes normally applied.

In addition to the surrounding circumstances there is certain conduct of the parties subsequent to the 1941 agreement, which throws light upon the intention of the parties,

and that is this question of the tungsten ore, the uncontradicted evidence is that the tungsten ore was subjected to a flotation process at the mine, and it is interesting to note that the flotation process is included among the ordinary treatment processes by the mine owners in the statute that I just referred to of the Internal Revenue Code. These concentrates resulting were sold in the eastern market direct from the mine, reports were made, and royalty paid accordingly under the net revenue clause. Then there were certain tungsten concentrates that were sent to the defendant's Boise purification plant, and with respect to those, the net smelter return method of computing royalty was used. Then there is the question of recitals in the 1950 modification agreement, Exhibit Number 6, which appears at Page 69 of the record transcript, in more particular the recitals with respect to May, 1950, royalty, which the uncontradicted evidence shows were computed according to the net smelter returns method.

I find that the parties, having in mind that this agreement was to last for such an unusually long period of time, that they envisioned, not only the possible method of marketing the mine product from the property, but also the possible variety of the minerals which possibly would be produced and marketed in the future, including gold, silver, antimony, tungsten, quicksilver and so forth, and as I read the provisions in question and particularly the provision commencing at Page 15 of the Transcript of the record, Exhibit Number 7, the 1941 Agreement, we first find that there is a five percent royalty promise on all net smelter returns, net revenue, and net mint returns, as defined herein; and then over on Page 17 we find that net smelter returns are defined, net revenue is defined, and net mint returns defined. Then, reading on through the provision with respect to transportation, we find that the parties refer to the three methods,

I shall call them, handling returns. Referring to those methods as net smelter, market or mint returns. Smelter, market or mint,—net smelter, market and mint returns, smelter, market or mint, to which the same are trucked and so forth. The emphasis upon market is persuasive in the light of all of the other circumstances, that the parties have in mind here possible marketing methods, envisioning the possibility over the years, so they, as to anything marketable, in a condition to be marketed, the mint,—at the time they contracted the mint was the market. As to anything required to go to the smelter, the smelter was the market. As to other matters, as to concentrates, ores, metals or values, the net revenue provision was intended as a catch-all,—another method of marketing direct from the property. In other words, by transporting the product directly from the mine to the mint whenever the quality would permit such a relatively simple operation; by sending it to the smelter to be processed in the customary way, and in the third place, by marketing ore concentrates and values direct to third persons from the mine, after the mining process had been completed. This evidence of custom and practice and other surrounding circumstances and subsequent conduct is not contradicted, nor is it otherwise illumined by any testimony from either Mr. Worthwine or Mr. Oberbillig.

It is my view that the Plaintiff's construction would read the net smelter returns provision out of the contract, since the net revenue clause is general and covers everything not otherwise covered. If the net revenue clause is not the general catch-all then there is no explanation for having the mint and the smelter returns clauses in the contract, they are specific and appear to limit or control the general,—by the net revenue is meant the amount paid by the purchaser from the sale of concentrate, any purchaser. It is broad enough, as pointed out this morning, to cover whatever is

There is no necessity under this view of the agreement to require an accounting and that will not be required.

The Court will rule that each party bears its own costs, and the Findings of Fact and Conclusions of Law and Declaratory Judgment will be prepared by counsel for the defendant.

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(Endorsed): Filed July 16, 1957